PUBLIC
22/07/2021 20:03:00

KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Date:	22 July 2021
Language:	English
Classification:	**Public**

Decision on Motions Challenging the Jurisdiction of the Specialist Chambers

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

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THE PRE-TRIAL JUDGE,[1] pursuant to Articles 22, 33(1) and 162(1) of the Constitution of Kosovo ("Constitution"), Articles 1(2), 3(2), 6-9, 12, 13(1)(i), 14(1)(c), 16, 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment ("Confirmation Decision" and "Indictment") against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli ("Mr Veseli"), Rexhep Selimi ("Mr Selimi") and Jakup Krasniqi ("Mr Krasniqi") (collectively "Accused").[2]

2. On 4 and 5 November 2020, upon order of the Pre-Trial Judge,[3] the Accused were arrested[4] and transferred to the detention facilities of the Specialist Chambers ("SC") in the Hague, the Netherlands.[5]

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[1] KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.
[2] KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED. KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. On 4 November 2020, a further corrected confirmed indictment, was submitted, F00045/A01, F00045/A02, F00045/A03.
[3] KSC-BC-2020-06, F00027, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, confidential, with Annexes 1-8, strictly confidential and *ex parte*. Corrected versions of Annexes 7 and 8 were filed on 28 October 2020, F00027/A07/COR and F00027/A08/COR. Public redacted versions of the annexes (F00027/A01/RED, F00027/A02/RED, F00027/A03/RED, F00027/A04/RED, F00027/A05/RED, F00027/A06/RED, F00027/A07/COR/RED, F00027/A08/COR/RED) and the decision (F00027/RED) were filed on 5 November 2020 and 26 November 2020, respectively.
[4] KSC-BC-2020-06, F00044, Registrar, *Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4)*, 4 November 2020, public; F00049, Registrar, *Notification of Arrest of Rexhep Selimi Pursuant to Rule 55(4)*, 5 November 2020, public; F00050, Registrar, *Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4)*, 5 November 2020, public; F00051, Registrar, *Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4)*, 5 November 2020, public.
[5] KSC-BC-2020-06, F00048, Registrar, *Notification of Reception of Jakup Krasniqi in the Detention Facilities of the Specialist Chambers*, 4 November 2020, public, with Annex 1, public; F00053, Registrar, *Notification of*

3. On 10 February 2021, the Defence for Mr Selimi ("Selimi Defence") filed a preliminary motion challenging the jurisdiction of the SC in relation to Joint Criminal Enterprise ("JCE") ("Selimi Jurisdiction Motion (JCE)").[6]

4. On 12 March 2021, the Defence for Mr Thaçi ("Thaçi Defence") filed a preliminary motion challenging the jurisdiction of the SC in relation to, *inter alia*, JCE and the charges against Mr Thaçi on the basis that these charges exceed the Report on Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Doc. 12462, 7 January 2011 by the Parliamentary Assembly of the Council of Europe ("Council of Europe Report" or "Report") ("Thaçi Jurisdiction Motion").[7]

5. On 15 March 2021, the Selimi Defence filed a preliminary motion challenging the jurisdiction of the SC in relation to the structure and composition of the employed personnel ("Selimi Jurisdiction Motion (Discrimination)"), in which it further supports various arguments in relation to the Council of Europe Report contained in the Thaçi Jurisdiction Motion.[8]

6. On 15 March 2021, the Defence for Mr Krasniqi ("Krasniqi Defence") filed a preliminary motion challenging the jurisdiction of the SC in relation to JCE and certain of the crimes charged on the basis that these crimes do not relate to the Council of Europe Report ("Krasniqi Jurisdiction Motion").[9] The Krasniqi Defence further adopts the challenges to the jurisdiction of the SC submitted by the Thaçi Defence,

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Reception of Hashim Thaçi in the Detention Facilities of the Specialist Chambers and Appointment of Counsel, 5 November 2020, public, with Annex 1, public, and Annex 2, confidential; F00054, Registrar, *Notification of Reception of Kadri Veseli in the Detention Facilities of the Specialist Chambers and Appointment of Counsel*, 5 November 2020, public, with Annex 1, public, and Annex 2, confidential; F00055, Registrar, *Notification of Reception of Rexhep Selimi in the Detention Facilities of the Specialist Chambers*, 5 November 2020, public, with Annex 1, public.

[6] KSC-BC-2020-06, F00198, Selimi Defence, *Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise*, 10 February 2021, public.

[7] KSC-BC-2020-06, F00216, Thaçi Defence, *Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction*, 12 March 2021, public.

[8] KSC-BC-2020-06, F00219, Selimi Defence, *Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination*, 15 March 2021, public, para. 4.

[9] KSC-BC-2020-06, F00220, Krasniqi Defence, *Krasniqi Defence Preliminary Motion on Jurisdiction with Public Annex 1*, 15 March 2021, public.

Selimi Defence and Veseli Defence, insofar as these challenges are not inconsistent with the Krasniqi Jurisdiction Motion.[10]

7. On 15 March 2021, the Defence for Mr Veseli ("Veseli Defence") filed a preliminary motion challenging the jurisdiction of the SC in relation to customary international law, JCE, superior responsibility, arbitrary arrest and detention, and enforced disappearance ("Veseli Jurisdiction Motion").[11] The Veseli Defence also adopts the submissions of the Thaçi Defence to the extent that these submissions are not inconsistent with the Veseli Jurisdiction Motion.[12]

8. On 23 April 2021, further to the time limit set by the Pre-Trial Judge,[13] the Specialist Prosecutor's Office ("SPO") responded, *inter alia*, to the preliminary motions challenging the jurisdiction of the SC in relation to: (i) the Council of Europe Report ("SPO CoE Response");[14] (ii) customary international law, superior responsibility, arbitrary arrest and detention, and enforced disappearance ("SPO CIL Response");[15] and (iii) JCE ("SPO JCE Response").[16]

9. On 14 May 2021, the Krasniqi Defence replied to the SPO CoE Response ("Krasniqi CoE Reply") and the SPO JCE Response ("Krasniqi JCE Reply");[17] the Selimi Defence replied to the SPO JCE Response ("Selimi JCE Reply");[18] and the

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[10] Krasniqi Jurisdiction Motion, para. 3.
[11] KSC-BC-2020-06, F00223, Veseli Defence, *Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC*, 15 March 2021, public.
[12] Veseli Jurisdiction Motion, footnote 1.
[13] KSC-BC-2020-06, Transcript (rev), 24 March 2021, p. 391, lines 11-18, public.
[14] KSC-BC-2020-06, F00259, Specialist Prosecutor, *Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate,* 23 April 2021, public.
[15] KSC-BC-2020-06, F00262, Specialist Prosecutor, *Prosecution Response to Preliminary Motion Concerning Applicability of Customary International Law*, 23 April 2021, public.
[16] KSC-BC-2020-06, F00263, Specialist Prosecutor, *Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)*, 23 April 2021, public.
[17] KSC-BC-2020-06, F00299, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate*, 14 May 2021, public; F00302, Krasniqi Defence, *Krasniqi Defence Reply to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)*, 14 May 2021, public.
[18] KSC-BC-2020-06, F00301, Selimi Defence, *Selimi Defence Reply to SPO Response to Defence Challenge to Jurisdiction – Joint Criminal Enterprise*, 14 May 2021, public.

Thaçi Defence replied to the SPO CoE Response ("Thaçi CoE Reply") and the SPO JCE Response ("Thaçi JCE Reply").[19]

10. On 17 May 2021, further to the extension of the time limit granted by the Pre-Trial Judge,[20] the Veseli Defence replied to the SPO JCE Response ("Veseli JCE Reply") and the SPO CIL Response ("Veseli CIL Reply").[21]

11. On 1 June 2021, further to the authorisation granted by the Pre-Trial Judge,[22] the SPO submitted a sur-reply to the Veseli CIL Reply ("SPO CIL Sur-Reply").[23]

12. On 4 June 2021, the Veseli Defence filed its submissions regarding the SPO CIL Sur-Reply ("Veseli Submissions SPO CIL Sur-Reply").[24]

13. On 19 May 2021 and 24 June 2021, the Pre-Trial Judge varied the time limit for disposing of the preliminary motions to 22 July 2021.[25]

14. On 21 July 2021, the Pre-Trial Judge indicated that: (i) a decision on motions challenging the jurisdiction of the SC pursuant to Rule 97(1)(a) of the Rules and a decision on motions alleging defects in the form of the indictment pursuant to Rule 97(1)(b) of the Rules will be issued on 22 July 2021; (ii) the deadline for any

[19] F00304, Thaçi Defence, *Thaçi Defence Reply to "Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate"*, 14 May 2021, public; F00306, Thaçi Defence, *Thaçi Defence Reply to "Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)"*, 14 May 2021, public.
[20] KSC-BC-2020-06, F00296, Pre-Trial Judge, *Decision on Veseli Defence Request for a Time Limit Variation*, 14 May 2021, public.
[21] KSC-BC-2020-06, F00310, Veseli Defence, *Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)*, 17 May 2021, public; F00311, Veseli Defence, *Veseli Defence Reply to Prosecution Response to the Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law)*, 17 May 2021, public.
[22] KSC-BC-2020-06, F00326, Pre-Trial Judge, *Decision on SPO Request for Leave to Sur-Reply*, 28 May 2021, public.
[23] KSC-BC-2020-06, F00333, Specialist Prosecutor, *Prosecution Sur-Reply*, 1 June 2021, public.
[24] KSC-BC-2020-06, F00342, Veseli Defence, *Veseli Defence Response to Prosecution Sur-Reply*, 4 June 2021, public.
[25] KSC-BC-2020-06, Transcript, 19 May 2021, public, p. 451, lines 15-17; F00370, Pre-Trial Judge, *Decision on Prosecution Request for Extension of Time Limit to Provide its Rule 102(3) Notice*, 24 June 2020, public, paras 15, 16(f).

requests for leave to appeal will be extended until after the recess; and (iii) a third decision regarding constitutional challenges will be issued after the recess.[26]

II. SUBMISSIONS OF THE PARTIES

A. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

1. The Veseli Jurisdiction Motion

15. The Veseli Jurisdiction Motion is premised on the argument that the SC are not an international tribunal but a domestic court of Kosovo, which must therefore apply domestic law in compliance with the Constitution.[27] The Veseli Defence submits that Article 33 of the Constitution in conjunction with Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "Convention"), as interpreted by the European Court of Human Rights ("ECtHR"), bar the SC from exercising jurisdiction over crimes solely under customary international law, unless these crimes have been incorporated into Yugoslav domestic law applicable at the time of the alleged commission of the crimes charged, notably the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY" and "SFRY Constitution") and the 1976 Criminal Code of the SFRY ("SFRY Criminal Code").[28]

16. The Veseli Defence contends that neither an international treaty nor customary international law could create offences in the domestic legal order without a statutory enactment giving them domestic effect, which in the case of the SC should be the SFRY Criminal Code, constituting *lex specialis* over customary international law.[29] In other words, the Veseli Defence contends that, in conformity with Articles 33 and 53 of the Constitution, it must be demonstrated that the alleged conduct was either criminalised under the SFRY Criminal Code, as applicable during the temporal jurisdiction of the

[26] KSC-BC-2020-06, Transcript, 21 July 2021, public, p. 457, lines 5-16.
[27] Veseli Jurisdiction Motion, paras 40-90.
[28] Veseli Jurisdiction Motion, paras 31, 40-77.
[29] Veseli Jurisdiction Motion, paras 12, 16(vi).

SC; or was an offence under customary international law and incorporated under domestic law of Yugoslavia applicable to Kosovo at the relevant time.[30] Should customary international law be deemed as directly applicable before the SC, the SC must first apply domestic law in line with the principle of the most favourable law (*lex mitior*) and refer to international law only as a subsidiary basis.[31] The Veseli Defence also submits that the primacy given to customary international law by Article 12 of the Law is unconstitutional, as it does so in misplaced reliance on Article 7(2) ECHR, which has been definitively interpreted by the ECtHR as applicable only to World War II crimes.[32]

2. The SPO CIL Response

17. The SPO responds that the drafters of the Law clearly intended to vest the SC with jurisdiction over crimes against humanity and war crimes as defined under customary international law between 1998 and 2000.[33] Accordingly, the Veseli Defence's arguments regarding the duality test are misplaced, as the Law does not create new crimes or change old ones, but simply unlocks a jurisdictional avenue to prosecute crimes allegedly committed in Kosovo between 1998 and 2000.[34] Both Article 162 of the Constitution and the Law, which regulates the SC's jurisdiction, were necessary to fulfil Kosovo's international obligations arising out of the Exchange of Letters with the European Union.[35] The SPO submits that Article 33 of the Constitution is compatible with Article 7 ECHR (as interpreted by the ECtHR)[36] and Article 15 of the International Covenant on Civil and Political Rights ("ICCPR"), which allow persons to be held criminally responsible for crimes under either national

[30] Veseli Jurisdiction Motion, para. 16(vii).
[31] Veseli Jurisdiction Motion, paras 16(vii), 32, 76.
[32] Veseli Jurisdiction Motion, paras 17-30.
[33] SPO CIL Response, paras 2, 19.
[34] SPO CIL Response, para. 24.
[35] SPO CIL Response, para. 3.
[36] SPO CIL Response, paras 3, 5.

or international law, including customary international law, at the time they were committed.[37]

18. The SPO submits that it was accessible and foreseeable to the Accused that war crimes and crimes against humanity existed under customary international law, considering that: (i) various international instruments since World War II provided for such crimes; (ii) the SFRY ratified treaties relevant to these crimes; (iii) the crimes charged were flagrant violations of human rights and, as such, it is inconceivable that the Accused could not foresee that individual criminal responsibility might arise out of such conduct; (iv) the International Criminal Tribunal for the former Yugoslavia ("ICTY") could exercise jurisdiction over war crimes and crimes against humanity in Kosovo during the charged timeframe; and (v) domestic prohibitions under the SFRY Criminal Code mirror the underlying acts charged under customary international law. Moreover, the SPO contends that the responsibilities held by all Accused during the time of the charges demanded that they be familiar with prohibited war crimes and crimes against humanity.[38]

19. The SPO further submits that there is no issue with the principle of *lex mitior*, as the Law applies customary international law and not domestic law as purported by the Veseli Defence.[39] Therefore, there is no need to compare the Law with Kosovo domestic law nor with international law.[40]

3. The Veseli CIL Reply

20. The Veseli Defence replies[41] that Mr Veseli has been charged before a purely domestic court, in violation of the non-retroactivity principle, with crimes that did not

[37] SPO CIL Response, para. 4.
[38] SPO CIL Response, paras 9-16.
[39] SPO CIL Response, para. 28.
[40] SPO CIL Response, para. 29.
[41] The Veseli Defence also incorporates paras 2-32 of the Veseli JCE Reply.

exist under the domestic law in Kosovo in 1998 and 1999.[42] In this respect, the Veseli Defence recalls a 2020 judgment from the Serbian Constitutional Court ("2020 Serbian CC Judgment"), which holds that the criminal law applicable in Kosovo in 1998-1999 is the only source of criminal liability for alleged crimes committed during that time and, accordingly, international law alone cannot form the basis for criminal liability unless incorporated into domestic law.[43] Considering that Kosovo in 1998-1999 was part of Serbia, it would be a violation of the Constitution if the SC were to approach the retroactivity issue in a manner less favourable to the Accused when compared to other defendants before Serbian courts, for crimes committed in one and the same context by persons subject to one and the same law at the time.[44] In addition, the Veseli Defence argues, also in light of the 2020 Serbian CC Judgment, that Article 7(2) ECHR does not amount to a permanent derogation of the non-retroactivity principle in Article 7(1) ECHR.[45] The Veseli Defence contends that, according to an expert opinion prepared by two of the main drafters of the Constitution ("Expert Opinion"), international treaties and customary international law do not have a direct effect in criminal matters in Kosovo and Article 33(4) of the Constitution operates as *lex specialis* to any legal norm that determines the legal punishment for a certain criminal conduct.[46]

21. Accordingly, the Veseli Defence reiterates its position that according to the SFRY Constitution, which was applicable at the time of the crimes charged, it was prohibited to rely on customary international law as a source of criminal liability unless a particular offence or mode of liability was directly incorporated into domestic law applicable at the time.[47] In this respect, the Veseli Defence reiterates its argument that Article 33(1) of the Constitution mirrors Article 7(2) ECHR, which according to the

[42] Veseli CIL Reply, para. 2.
[43] Veseli CIL Reply, paras 3, 11.
[44] Veseli CIL Reply, paras 10, 12-15.
[45] Veseli CIL Reply, para. 7.
[46] Veseli CIL Reply, para. 16(a).
[47] Veseli CIL Reply, para. 8.

ECtHR is now obsolete and cannot constitute an exception to the principle of non-retroactivity.[48]

22. Regarding the *lex mitior* principle, the Veseli Defence replies that the SPO ignores Article 33 of the Constitution, which directly requires the SC to engage in an assessment of which law is more favourable to the Accused.[49] Articles 12 and 15(1) of the Law provide, at the very least, for concurrent application of customary international law and domestic law.[50]

4. The SPO CIL Sur-Reply

23. The SPO submits that the 2020 Serbian CC Judgment has no bearing on the jurisdiction of courts within the Kosovo justice system.[51] The SPO further submits that, as the SC shall apply customary international law as it existed at the time of the charges, the findings in the 2020 Serbian CC Judgment are irrelevant and, accordingly, the Defence arguments related to alleged inequality between the Accused and other persons prosecuted for similar crimes before Serbian courts fail.[52]

5. The Veseli Submissions SPO CIL Sur-Reply

24. The Veseli Defence replies by reiterating and elaborating further on its arguments with regard to the alleged discrimination in prosecuting Serbian and Albanian persons on the basis of two different bodies of laws for the same alleged crimes, to the detriment of the Accused.[53] By prosecuting the Accused for crimes that were not

[48] Veseli CIL Reply, paras 17-25.
[49] Veseli CIL Reply, para. 29.
[50] Veseli CIL Reply, para. 30.
[51] SPO CIL Sur-Reply, para. 2.
[52] SPO CIL Sur-Reply, paras 4-5.
[53] Veseli Submissions SPO CIL Sur-Reply, paras 8-10.

domestic crimes, the Veseli Defence argues that this would result in a gross discrimination between two separate ethnic parties to the same conflict.[54]

B. THE COUNCIL OF EUROPE REPORT

1. The Thaçi Jurisdiction Motion

25. The Thaçi Defence requests the Pre-Trial Judge to declare that the SC do not have jurisdiction over the crimes as charged in the Indictment as none of the charges relate to the allegations against Mr Thaçi in the Council of Europe Report.[55]

26. The Thaçi Defence avers that the investigation of the Special Investigative Task Force ("SITF") went beyond the allegations of organ trafficking and inhumane treatment in detention centres in Albania that were the focus of the Council of Europe Report.[56] It adds that the Assembly reined in the jurisdictional reach of the SC, linking their purpose and existence to compliance with international obligations in relation to the Report, and that this limitation is confirmed by the debates in the Assembly.[57] Furthermore, it is the position of the Defence that the use of the word "and" in Article 1(2) of the Law provides no scope for the prosecution of crimes falling outside the Council of Europe Report allegations or arising from subsequent SPO investigations.[58] It further contends that the timing, location, and lack of nexus to the armed conflict put the Council of Europe Report crimes out of the reach of the ICTY, and that the SC's jurisdiction was intended and crafted to address this void.[59]

27. In the view of the Thaçi Defence, the Indictment has been drafted with a disregard for the limitations imposed by the Constitution and confirmed in the

[54] Veseli Submissions SPO CIL Sur-Reply, para. 11.
[55] Thaçi Jurisdiction Motion, paras 1(a), 75.
[56] Thaçi Jurisdiction Motion, paras 9-10, 13-22, 28.
[57] Thaçi Jurisdiction Motion, paras 23-24, 29-30.
[58] Thaçi Jurisdiction Motion, paras 25-26.
[59] Thaçi Jurisdiction Motion, paras 31-32.

legislation establishing the SC.[60] First, the Thaçi Defence contends that the only locations listed with any specificity in the Council of Europe Report are the detention facilities on the territory of Albania, whereas the crimes alleged in the Indictment took place almost exclusively in Kosovo.[61] Second, the Thaçi Defence asserts that the Indictment's temporal scope is limited to at least March 1998 through September 1999, but that the Council of Europe Report concerns acts that are alleged to have occurred for the most part from the summer of 1999 onwards.[62] Third, according to the Thaçi Defence, even though the Council of Europe Report describes the framework of the alleged criminal activity as organized crime instead of referring to war crimes or crimes against humanity, the Indictment makes no reference to organized crime in Kosovo or elsewhere.[63]

2. The Selimi Jurisdiction Motion (Discrimination)

28. The Selimi Defence supports and endorses the arguments of the Thaçi Defence set forth above.[64] On this basis, the Selimi Defence asserts that the SPO conducted a criminal investigation against Mr Selimi without a legal basis, given that he was never the subject of allegations in the Council of Europe Report.[65]

3. The Krasniqi Jurisdiction Motion

29. The Krasniqi Defence submits that the SC have no jurisdiction over most of the crimes pleaded in the Indictment as, contrary to Article 6(1) of the Law, they do not relate to the Council of Europe Report.[66]

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[60] Thaçi Jurisdiction Motion, para. 33.
[61] Thaçi Jurisdiction Motion, paras 34-36.
[62] Thaçi Jurisdiction Motion, paras 37-38.
[63] Thaçi Jurisdiction Motion, paras 39-41.
[64] Selimi Jurisdiction Motion (Discrimination), para. 4, footnote 5.
[65] Selimi Jurisdiction Motion (Discrimination), p. 4, footnote 16.
[66] Krasniqi Jurisdiction Motion, paras 2, 55, 69, 71.

30. The Krasniqi Defence submits that the Council of Europe Report was commissioned to investigate the specific allegation of organ trafficking as organised criminal activity by members of the Kosovo Liberation Army ("KLA") after the end of the armed conflict in Albania.[67] It adds that the SITF understood that it was mandated to investigate these crimes as any crimes allegedly committed between March 1998 and April 1999 in Kosovo fell within the ICTY's jurisdiction.[68] In the view of the Krasniqi Defence, the scope of proceedings before the SC was intended to be limited to the allegations in the Council of Europe Report.[69] In this regard, it argues that, as allegations of detention centre crimes committed in Kosovo during the conflict had already been investigated by the ICTY and by EULEX, Article 103(7) of the Constitution, as confirmed by the Constitutional Court, only gave the legislator the power to create the SC so as to prosecute the allegations contained in the Report.[70] The Krasniqi Defence argues that, had the drafters intended to permit a broader range of crimes to be prosecuted, the Law or the Rules would have provided statutory guidance on the meaning of the words "relate to" in Article 6(1) of the Law.[71] It also contends that, as a matter of human rights law, the SC should not adopt an expansive interpretation of its jurisdiction to the detriment of the Accused.[72]

31. Lastly, the Krasniqi Defence is of the view that, even though the Council of Europe Report refers to an alleged policy whereby suspected collaborators were detained on the territory of Albania for interrogation in the period April – June 1999 and it identifies that individuals were suspected of being collaborators on the basis of spying for the Serbs or supporting the KLA's political and military rivals, that remains far removed from the Indictment in the present case.[73]

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[67] Krasniqi Jurisdiction Motion, paras 57-60, 67.
[68] Krasniqi Jurisdiction Motion, paras 61, 65(b).
[69] Krasniqi Jurisdiction Motion, para. 62.
[70] Krasniqi Jurisdiction Motion, paras 63, 65(a), 66.
[71] Krasniqi Jurisdiction Motion, para. 65(c).
[72] Krasniqi Jurisdiction Motion, para. 65(d).
[73] Krasniqi Jurisdiction Motion, para. 68.

4. The SPO CoE Response

32. The SPO responds that the Defence's arguments must be rejected as the charges in the Indictment all clearly relate to the Council of Europe Report and are, thus, within the subject-matter jurisdiction of the SC.[74]

33. The SPO submits that, had Article 162(1) of the Constitution been designed to narrow or correct the scope of SITF investigations, it would have been necessary for the language to expressly define the manner in which the Council of Europe Report was to be read or to identify the specific allegations providing the permissible scope of the subject matter jurisdiction of the SC.[75] In addition, the SPO asserts that it is not proper statutory interpretation to resort to the drafting history in the face of clear statutory language.[76] It also avers that the Defence interpretation is directly contradicted by the plain language of the Law.[77]

34. Furthermore, according to the SPO, the Law must not be read so as to exclude any overlap of jurisdiction with matters falling within the jurisdiction of the ICTY as neither the Constitution nor the Law circumscribe the SC's jurisdiction by reference to the ICTY but the possibility of substantive overlap appears to have been specifically foreseen in the Law.[78] It adds that it is implausible to suggest that a mutually exclusive mandate with the ICTY had been created as the latter was deep into its completion strategy when the Law was being considered.[79]

35. In addition, according to the SPO, the reference to crimes that "relate to" the Council of Europe Report in the Law makes it clear that a perfect overlap is not

[74] SPO CoE Response, paras 1, 33.
[75] SPO CoE Response, para. 7.
[76] SPO CoE Response, para. 8.
[77] SPO CoE Response, paras 9-10.
[78] SPO CoE Response, para. 11.
[79] SPO CoE Response, para. 12.

required.[80] The SPO adds that Article 1(2) of the Law is descriptive, rather than jurisdictional, in nature.[81] It further argues that it would have been unreasonable to strictly limit the jurisdiction of the SC only to those incidents prior to any criminal investigation having been conducted.[82]

36. The SPO also asserts that the charges in the Indictment fall within the scope of matters expressly addressed in the Council of Europe Report.[83] In its view, the Report expressly contains allegations of international crimes and it similarly recognises other aspects of the case against the Accused.[84] Furthermore, the SPO avers that the Council of Europe Report does not exclusively focus on crimes committed in Albania, as it expressly references crimes in various parts of Kosovo.[85] In addition, it contends that the very words "for the most part" reveal that this Report encompassed crimes beyond the summer of 1999.[86] Lastly, the SPO submits that the Council of Europe Report describes potential perpetrators in a non-exhaustive way.[87]

5. The Krasniqi CoE Reply

37. The Krasniqi Defence replies that the SPO fails to establish that the charges in the Indictment relate to the Council of Europe Report.[88]

38. The Krasniqi Defence disagrees with the SPO that any link the Council of Europe Report, however tenuous, is sufficient to give jurisdiction to the SC.[89] In its view, the only reason to include the clause "which relate to" in Article 6(1) of the Law is to narrow the jurisdiction of the SC so that it only has jurisdiction over those crimes

[80] SPO CoE Response, para. 13.
[81] SPO CoE Response, footnote 24.
[82] SPO CoE Response, para. 13.
[83] SPO CoE Response, para. 15.
[84] SPO CoE Response, paras 16, 17, 18.
[85] SPO CoE Response, para. 19.
[86] SPO CoE Response, para. 20.
[87] SPO CoE Response, para. 21.
[88] Krasniqi CoE Reply, paras 1, 20, 21.
[89] Krasniqi CoE Reply, para. 4.

relating to the Council of Europe Report, which is consistent with the harmonious interpretation of the Law and the Constitution.[90] The Krasniqi Defence adds that, in considering the validity of Article 6(1) of the Law in the light of Article 162 of the Constitution, the SPO fails to address its submission which was founded on Article 103(7) of the Constitution.[91]

39. The Krasniqi Defence asserts that, aside from the allegations about Cahan and Kukës, the SPO fails to demonstrate that the remainder of the charges in the Indictment relate to the Council of Europe Report.[92]

40. According to the Krasniqi Defence, the SPO's construction of Article 6(1) of the Law is not advanced by its references to other provisions of the Law.[93] First, the Krasniqi Defence argues that allegations in the Council of Europe Report included that victims were transported from Kosovo to Albania so that jurisdiction over crimes in Kosovo would have been required in order fully to investigate those cases.[94] Second, the Krasniqi Defence avers that the Law provides for jurisdiction over international crimes does not mean that the SC's jurisdiction exceeds the Council of Europe Report's focus on crimes committed in Albania after April 1999.[95] Third, the Krasniqi Defence submits that the fact that the Law provides for evidence collected by the ICTY to be admissible is not inconsistent with the Defence position, as evidence of the existence of an armed conflict and evidence about military command structures are plainly relevant to cases within the jurisdiction of the SC.[96] Lastly, the Krasniqi Defence is of the view that the *non-bis-in-idem* provisions operate specifically to exclude certain overlaps with ICTY investigations rather than evidencing a broader jurisdiction.[97]

[90] Krasniqi CoE Reply, paras 5-6.
[91] Krasniqi CoE Reply, para. 6.
[92] Krasniqi CoE Reply, paras 7-14.
[93] Krasniqi CoE Reply, para. 15.
[94] Krasniqi CoE Reply, para. 16.
[95] Krasniqi CoE Reply, para. 17.
[96] Krasniqi CoE Reply, para. 18.
[97] Krasniqi CoE Reply, para. 19.

6. The Thaçi CoE Reply

41. The Thaçi Defence replies that the SPO distorts the jurisdictional reach of the SC as provided by Article 162 of the Constitution and Chapter III of the Law by wrongfully disconnecting those provisions from the limitation imposed by Article 6(1) of the Law that the crimes must relate to the Council of Europe Report.[98]

42. According to the Thaçi Defence, even though the SC's jurisdictional parameters may be wider, an alleged crime must also be related to the Report.[99] It adds that it would have been unreasonable for the legislature to agree to the jurisdictional remit proposed by the SPO.[100] Furthermore, in the view of the Thaçi Defence, the Vienna Convention on the Law of Treaties is irrelevant for the interpretation of a domestic statute and it is well recognised that legislative history and parliamentary debates may be considered for purposes of interpretation in domestic systems.[101]

43. The Thaçi Defence further submits that Article 17 of the Law is superfluous as it refers to an already existing norm in the Constitution, and that Article 37 of the Law merely provides for the admissibility of certain types of evidence.[102] It also contends that the majority of the Indictment's allegations relate to incidents or events that have already been prosecuted and adjudicated by either the ICTY, UNMIK or EULEX.[103]

44. In the view of the Thaçi Defence, the SPO isolates words and phrases from within the Counsel of Europe Report to claim that they contain express allegations of international crimes, and disengages from the actual allegations and incidents that are addressed in the Report.[104] It asserts that the paragraphs of the Council of Europe

[98] Thaçi CoE Reply, para. 1.
[99] Thaçi CoE Reply, para. 2.
[100] Thaçi CoE Reply, paras 3- 4.
[101] Thaçi CoE Reply, para. 5.
[102] Thaçi CoE Reply, paras 6-7.
[103] Thaçi CoE Reply, para. 8.
[104] Thaçi CoE Reply, para. 10.

Report relating to international crimes invoked by the SPO are background references that relate to prior investigations or allegations.[105] The Thaçi Defence further contends that the fact that four paragraphs of the Council of Europe Report make reference to crimes committed in Kosovo, or that its title mentions Kosovo, cannot circumvent the fact that the allegations are limited to events in Albania.[106] Lastly, the Thaçi Defence submits that the reference to acts occurring "for the most part" from the summer of 1999 onwards relates to the inhumane treatment in detention discussed in the Council of Europe Report and does not throw open the door to assert jurisdiction over any and all acts or alleged crimes committed during the preceding armed conflict.[107]

C. ARBITRARY DETENTION

1. The Veseli Jurisdiction Motion

45. The Veseli Defence submits that the war crime of arbitrary detention has no legal basis in Article 14(1)(c) of the Law.[108] Likewise, it is submitted that arbitrary detention in non-international armed conflict does not constitute a serious violation of Article 3 common to the Four Geneva Conventions of 1949 ("Common Article 3", "Geneva Conventions" or "GCs"), nor did it violate customary international law at the time of the charges.[109] As a result, any expansion of the charges by analogy, without a clear and strong basis in law, would infringe the principle of legality enshrined in Article 33(1) of the Constitution and Article 7 ECHR.[110] In addition, the Veseli Defence submits that the Pre-Trial Judge erroneously relied on the Customary International Humanitarian Law Study of the International Committee of the Red Cross

[105] Thaçi CoE Reply, paras 11-12, 21.
[106] Thaçi CoE Reply, paras 15, 18, 21.
[107] Thaçi CoE Reply, paras 19-21.
[108] Veseli Jurisdiction Motion, paras 131-132, 135-136.
[109] Veseli Jurisdiction Motion, paras 131-132, 139-142, 144-147.
[110] Veseli Jurisdiction Motion, paras 134, 137.

("customary IHL", "Customary IHL Study"[111] and "ICRC") to identify a rule of customary international law prohibiting arbitrary detention.[112]

2. The SPO CIL Response

46. The SPO responds that the prohibition against arbitrary detention falls within the purview of Article 14(1)(c) of the Law, both under a literal interpretation of its open ended formulation and because such conduct is contrary to the principle of humane treatment enshrined in Common Article 3.[113] As such, the SPO contends that arbitrary detention constitutes a serious violation of Common Article 3, which aims to protect primarily the fundamental rights to life, liberty and security of the person, including physical integrity.[114] The SPO submits that there exists sufficient practice to substantiate a rule of customary international law in respect of arbitrary detention in non-international armed conflict.[115]

3. The Veseli CIL Reply

47. The Veseli Defence replies that the practice in support of a customary rule in relation to arbitrary detention is plainly insufficient.[116] In addition, the Veseli Defence submits that the Albanian translation of Article 14(1)(c) of the Law supports the Defence assertion that this provision does not in fact open the door to include conduct that is not expressly mentioned in Article 14 of the Law.[117]

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[111] Henckaerts J.-M., Doswald-Beck L., *Customary International Humanitarian Law*, Volume I (Rules), Volume II (Practice), Cambridge University Press 2005.
[112] Veseli Jurisdiction Motion, para. 143.
[113] SPO CIL Response, paras 49-51.
[114] SPO CIL Response, para. 57.
[115] SPO CIL Response, paras 52-53.
[116] Veseli CIL Reply, paras 47-51.
[117] Veseli CIL Reply, para. 41.

D. ENFORCED DISAPPEARANCE OF PERSONS

1. The Veseli Jurisdiction Motion

48. The Defence submits that the SC do not have jurisdiction over enforced disappearance as a crime against humanity as it is not explicitly recognised in the Law or in Kosovo's domestic law.[118] The Defence further submits that, even if customary international law would be found to have direct effect, this crime was not sufficiently established under this body of law at the time of the incidents alleged in the Indictment.[119] In the view of the Defence, the majority of the instruments cited in the Confirmation Decision have been enacted following the events alleged in the Indictment,[120] and the remaining authorities are inapposite.[121] Furthermore, the Defence avers that a number of sources establish that this crime did not have customary international law status in 1998.[122] In addition, in the submission of the Defence, the finding that "there is no need to demonstrate or even presume the special intention of the perpetrator to remove the victim from the protection of the law" is flawed as the authorities cited either refer to documents successive to the relevant time frame or pertain to a "future" definition of this crime.[123] The Defence adds that, in any event, the sources cited simply do not support the aforementioned conclusion.[124]

2. The SPO CIL Response

49. The SPO responds that the SC have jurisdiction over enforced disappearance as a crime against humanity.[125] According to the SPO, the Defence submissions fail to detract from and largely ignore that a cumulative consideration of consistent State

[118] Veseli Jurisdiction Motion, para. 37.
[119] Veseli Jurisdiction Motion, paras 38, 158.
[120] Veseli Jurisdiction Motion, para. 151.
[121] Veseli Jurisdiction Motion, paras 152-153.
[122] Veseli Jurisdiction Motion, paras 154-157.
[123] Veseli Jurisdiction Motion, paras 159-160, 162.
[124] Veseli Jurisdiction Motion, para. 161.
[125] SPO CIL Response, paras 1, 82.

practice and *opinio juris* from at least 1946, as well as the persistent absence of contrary practice or objection, demonstrate that, by 1998, enforced disappearance was a crime against humanity under customary international law.[126] It adds that post-1999 statutes and jurisprudence confirm that acts of enforced disappearance committed before and during the SC's temporal jurisdiction constituted crimes against humanity.[127] In addition, the SPO argues that, even assuming *arguendo* that enforced disappearance was not an explicitly recognised crime against humanity in customary international law by 1998, by its very nature it rises to the level of other crimes against humanity, namely another inhumane act.[128] Furthermore, in the view of the SPO, arguments as to the special intent of enforced disappearance go to the contours of this crime and are improperly advanced as a jurisdictional challenge.[129] The SPO adds that, in any event, the intent to remove the victim from the protection of the law, while featuring in the International Criminal Court ("ICC") Statute, is not a requirement under customary international law and, in turn, the Defence arguments concerning the application of the regime most favourable to the Accused are misplaced and unfounded.[130]

3. The Veseli CIL Reply

50. The Defence replies that the SPO fails to respond to the following arguments: (i) the United Nations ("UN") Working Group on Enforced or Involuntary Disappearances declared on the customary international law status of enforced disappearance only in 2009; (ii) no international criminal court or tribunal has ever entered a conviction, or even started any investigation, against a person suspected of having committed enforced disappearance; (iii) enforced disappearance was not recognized as a crime against humanity by the statutes of the ICTY, International

[126] SPO CIL Response, paras 62-74, 78.
[127] SPO CIL Response, paras 75-77.
[128] SPO CIL Response, para. 79.
[129] SPO CIL Response, para. 80.
[130] SPO CIL Response, para. 81.

Criminal Tribunal for Rwanda ("ICTR"), Extraordinary Chambers in the Courts of Cambodia ("ECCC") and Special Court for Sierra Leone ("SCSL"); (iv) the SPO cannot show how many States criminalized enforced disappearance before 1998 and how many criminalised it as a crime against humanity; (v) the SPO fails to provide a single definition of enforced disappearance as a crime against humanity provided by an international legal instrument; and (vi) the fact that during the drafting of the ICC Statute there was considerable initial opposition to including enforced disappearance and considerable controversy over its definition.[131] The Defence also contends that the SPO fails to note that, as of 2005, there was no definition of enforced disappearance wide enough to cover non-State actors as well.[132]

E. JOINT CRIMINAL ENTERPRISE

1. Defence Jurisdiction Motions Relating to JCE

51. The Defence challenges the SC's jurisdiction over JCE along the following main lines of argumentation: (i) Article 16(1)(a) of the Law does not incorporate JCE; (ii) JCE is not part of Kosovo criminal law; (iii) JCE is not part of customary international law; (iv) JCE was not foreseeable or accessible to the Accused at the time the alleged crimes were committed; and (v) JCE goes against the principles of *in dubio pro reo*, *lex mitior*, culpability and does not attach to specific intent crimes.

52. As regards Article 16(1)(a) of the Law, the Defence submits that the explicit exclusion of JCE from its text appears to be a deliberate choice to reject JCE as a form of liability before the SC.[133] The Defence avers that the relevant jurisprudence of the ICTY should not be followed as it is clear that the Law, drafted more than twenty years

[131] Veseli CIL Reply, para. 56.
[132] Veseli CIL Reply, para. 57.
[133] Selimi Jurisdiction Motion (JCE), paras 22, 26-27; Thaçi Jurisdiction Motion, para. 61; Krasniqi Jurisdiction Motion, paras 17-18, 21; Veseli Jurisdiction Motion, para. 95.

after the ICTY Statute, reflects a deliberate decision not to include JCE.[134] It is further submitted that because of no specific mention of JCE in Article 16(1)(a) of the Law, the Pre-Trial Judge ought to enquire anew into the status of customary international law at the time of the events alleged in the Indictment and make a finding whether JCE had reached customary status by 1998-1999 and if so, in what form and scope.[135] The Defence further avers that it is the obligation of the SPO to justify that JCE falls within Article 16(1)(a) of the Law,[136] and that the SPO has not done so.[137]

53. As regards Kosovo criminal law, the Defence submits that none of the relevant provisions of the SFRY Criminal Code provide for a mode of liability which could be equated to JCE.[138] The Defence further submits that JCE differs from both co-perpetration and accomplice liability under Kosovo law.[139]

54. As regards customary international law, the Defence submits that JCE is not recognised in customary international law and even if it were so recognised today, it was not customary international law in 1998 and 1999.[140] The Defence avers that the appellate chambers of the ICTY and ECCC failed to conduct a rigorous review when they found that JCE was customary international law, in relation to its basic[141] and/or extended form.[142] The Defence maintains that the *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* ("Nuremberg Charter")[143] and the *Control Council Law No.*

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[134] Krasniqi Jurisdiction Motion, para. 21; Veseli Jurisdiction Motion, para. 95.
[135] Veseli Jurisdiction Motion, paras 96-97.
[136] Selimi Jurisdiction Motion (JCE), paras 23-25.
[137] Thaçi Jurisdiction Motion, para. 61.
[138] Selimi Jurisdiction Motion (JCE), paras 29-30.
[139] Selimi Jurisdiction Motion (JCE), paras 31-32.
[140] Selimi Jurisdiction Motion (JCE), paras 2, 36-40, 44-55; Thaçi Jurisdiction Motion, paras 63-66, Krasniqi Jurisdiction Motion, paras 1, 24.
[141] Selimi Jurisdiction Motion (JCE), paras 36-43, 44-55; Thaçi Jurisdiction Motion, para. 63; Krasniqi Jurisdiction Motion, para. 24.
[142] Selimi Jurisdiction Motion (JCE), paras 56-60; Thaçi Jurisdiction Motion, paras 67-71; Krasniqi Jurisdiction Motion, paras 24-27; Veseli Jurisdiction Motion, paras 98-105.
[143] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279, 8 August 1945.

10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity ("CCL10")[144] were adopted after the crimes were committed and do not provide for JCE liability.[145] The Defence also submits that given the ongoing controversy on whether JCE or co-perpetration as enshrined in the ICC Statute is the preferred mode of liability, it cannot be that JCE is firmly grounded in customary international law.[146] In particular, in relation to the extended form of JCE, the Defence submits that the post-World War II cases show an inconsistent State practice, which renders the existence of a customary rule regarding JCE III impossible.[147] The Defence also maintains that the case-law of the ECCC, the absence of State practice between the period covered by ECCC jurisdiction and the *Tadić* decision, recent UK case-law, statements of (former) judges and academic literature cast further doubt on the customary nature of JCE III.[148] The Defence also avers that JCE III is supported neither by international treaties nor by the general principles of law of national systems.[149]

55. As regards foreseeability and accessibility, the Defence submits that even if the Pre-Trial Judge finds that any of the three forms of JCE was part of customary international law, he must also examine whether these forms were sufficiently foreseeable and accessible to anyone in Kosovo at the relevant date.[150] The Defence further maintains that JCE was not foreseeable, nor accessible because it was not found in Kosovo law and because the *Tadić* appeal judgment of the ICTY was issued in July 1999.[151] The Defence also avers that JCE was not consistently defined in the jurisprudence of the ICTY and ICTR, so it raises a concern with the requirement of

[144] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).
[145] Selimi Jurisdiction Motion (JCE), para. 52; Selimi JCE Reply, paras 49-52.
[146] Thaçi Jurisdiction Motion, paras 63-66.
[147] Krasniqi Jurisdiction Motion, paras 28-38.
[148] Selimi Jurisdiction Motion (JCE), paras 56-68; Thaçi Jurisdiction Motion, paras 68-71; Krasniqi Jurisdiction Motion, paras 25, 27, 46-47; Veseli Jurisdiction Motion, paras 98-105.
[149] Krasniqi Jurisdiction Motion, paras 43-48.
[150] Selimi Jurisdiction Motion (JCE), paras 70-71; Krasniqi Jurisdiction Motion, para. 50.
[151] Selimi Jurisdiction Motion (JCE), paras 72-73; Krasniqi Jurisdiction Motion, paras 50-54.

precision, as a corollary of the principle of legality.[152] In relation to JCE III, the Defence adds that the concept of becoming responsible for crimes which fell outside the scope of the common plan but were foreseeable was unknown in international law and Kosovo law at the time the crimes were committed.[153]

56. As regards the principle of *in dubio pro reo,* the Defence submits that Article 16(1)(a) of the Law must be interpreted in favour of the Accused and should not be extensively construed to his detriment by introducing JCE liability.[154] In addition, the Defence submits that JCE III cannot fall within the meaning of the word "committed" or "aided and abetted" in Article 16(1)(a) of the Law and that any such attempt would be an interpretation to the detriment of the Accused.[155]

57. As regards the principle of *lex mitior*, the Defence maintains that even if the Pre-Trial Judge finds that JCE III existed in customary international law during the Indictment period, he must take in consideration the evolving state of the law that produces a result substantively more favourable to the Accused.[156] The Defence submits that the adoption of the ICC Statute, the prevalence of co-perpetration as a mode of liability, the UK Supreme Court decision in *R v. Jogee* all show the rejection of JCE III.[157]

58. As regards the principle of culpability, the Defence submits that JCE III is a mode of liability that endangers the principle of individual and culpable responsibility by introducing a form of collective liability or guilt by association.[158]

[152] Thaçi Jurisdiction Motion, para. 65.
[153] Krasniqi Jurisdiction Motion, paras 50-54.
[154] Krasniqi Jurisdiction Motion, paras 19-20; Veseli Jurisdiction Motion, para. 95.
[155] Krasniqi Jurisdiction Motion, para. 22.
[156] Veseli Jurisdiction Motion, para. 115.
[157] Veseli Jurisdiction Motion, paras 117-119.
[158] Thaçi Jurisdiction Motion, para. 67; Thaçi JCE Reply, paras 33-36.

59. As regards special intent crimes, the Defence submits that only the ICTY considers that JCE III can attach to such crimes and that the Special Tribunal for Lebanon ("STL") and the SCSL departed from this position.[159]

2. SPO JCE Response

60. As regards Article 16(1)(a) of the Law, the SPO responds that JCE exists in the SC statutory framework, as this article is virtually identical with the ICTY, ICTR, International Residual Mechanism for Criminal Tribunals ("IRMCT"), SCSL and ECCC statutes.[160] The SPO further submits that at the time the Law was adopted in 2015, each of the aforementioned courts had consistently found that "commission" within the meaning of their statutes encompassed JCE.[161] According to the SPO, the drafters of the Law were free to frame the applicable modes of liability as they wanted and they opted for the identical wording of the aforementioned statutes. Had they wanted to depart from this, they would have specifically stated so.[162] The SPO further submits that the Law must operate to reach all perpetrators, including those who participated jointly or in a group in the alleged commission of grave crimes.[163]

61. As regards Kosovo criminal law, the SPO responds that JCE liability has been applied in Kosovo courts adjudicating the commission of war crimes during the same period as the crimes charged in the Indictment.[164] The SPO also submits that the Supreme Court of Kosovo has upheld JCE as a mode of liability.[165]

62. As regards customary international law, the SPO responds that JCE liability formed part of customary international law at all times relevant to the Indictment and

[159] Veseli Jurisdiction Motion, paras 106-114.
[160] SPO JCE Response, para. 14.
[161] SPO JCE Response, para. 14.
[162] SPO JCE Response, para. 15.
[163] SPO JCE Response, paras 17-20.
[164] SPO JCE Response, para. 121.
[165] SPO JCE Response, para. 121.

that its customary status has been affirmed by the ICTY, ICTR, SCSL, STL and ECCC.[166] The SPO submits that the Nuremberg Charter, CCL10 and the post-World War II case-law show that accused persons were convicted of international crimes on the basis of their contributions to a common purpose or common design. The SPO avers that even if these sources do not address specific modes of liability or do not use JCE terminology, the principle of legality does not require this level of precision.[167] The SPO further sets out a number of post-World War II cases evidencing the application of JCE I and JCE III.[168] The SPO also submits that the principles of the Nuremberg Charter and the judgment of the International Military Tribunal were confirmed by the UN General Assembly in Resolution 95(I) of 1946 and that post-World War II case-law has been recognised as a source of customary international law by international tribunals.[169] The SPO further avers that the provisions of the ICC Statute regarding co-perpetration are irrelevant for the SC framework.[170]

63. As regards foreseeability and accessibility, the SPO responds that the principle of legality does not require a high level of precision, only that an accused be able to appreciate that his conduct is criminal in the sense generally understood.[171] The SPO further submits that the specificity of international law must be taken into account when assessing the requirements of foreseeability and accessibility and that various sources of law may be considered, including domestic law.[172] The SPO maintains that, as found by the ICTY Appeals Chamber, Article 26 of the SFRY Criminal Code bears striking similarity to JCE.[173] The SPO also submits that Articles 11 and 13 of the SFRY Criminal Code contain the *mens rea* akin to JCE III liability.[174] The SPO adds that the

[166] SPO JCE Response, paras 26-121.
[167] SPO JCE Response, paras 27-29.
[168] SPO JCE Response, paras 44-93.
[169] SPO JCE Response, paras 94-100.
[170] SPO JCE Response, paras 101-105.
[171] SPO JCE Response, paras 122-124.
[172] SPO JCE Response, paras 126-129.
[173] SPO JCE Response, paras 130-131.
[174] SPO JCE Response, paras 132-133.

gravity of the crimes at issue may refute any Defence claim alleging lack of awareness of the criminality of acts for which they stand accused.[175]

64. As regards the principle of *in dubio pro reo*, the SPO responds that no reasonable doubt exists warranting the application of this principle once the Law is interpreted in context.[176]

65. As regards the *lex mitior* principle, the SPO submits that neither the provisions of the ICC Statute nor the decisions of the ICC Chambers are material to SC jurisdiction concerning applicable modes of liability.[177]

66. As regards the principle of culpability, the SPO responds that the argument of the Defence fails because it does not acknowledge a foundational requirement of JCE, that there must be participation by the Accused.[178]

67. As regards JCE III applicability to special intent crimes, the SPO submits that, while the Defence's conclusion is incorrect, this argument does not amount to a jurisdictional challenge, because it does not raise lack of jurisdiction over a particular crime or mode of liability, but rather an issue to be addressed at trial.[179]

3. Defence Replies to SPO JCE Response

68. As regards Article 16(1)(a) of the Law, the Defence replies that, in their full awareness of the extent and persistence of the criticism of JCE, the drafters of the Law deliberately framed this article exhaustively and the principle of *expressio unius est exclusio alterius* undermines the SPO's position.[180] The Defence maintains that the SPO argument that the drafters should have modified the language of Article 16(1)(a) of

[175] SPO JCE Response, para. 134.
[176] SPO JCE Response, paras 23-25.
[177] SPO JCE Response, paras 104-105.
[178] SPO JCE Response, para. 118.
[179] SPO JCE Response, para. 9.
[180] Thaçi JCE Reply, paras 13-16.

the Law had they wanted to exclude JCE is illogical considering that the rule set out in Article 33 of the Constitution and Article 7 of the ECHR prohibits any type of interpretation by analogy to the detriment of the Accused.[181] The Defence also avers that the Law already provides for other forms of liability to allow for prosecution of individuals other than those who physically perpetrated a particular crime, whether it is aiding and abetting, instigation or ordering.[182]

69. As regards Kosovo criminal law, the Defence replies that the SPO ignored subsequent Kosovo decisions rejecting JCE and that the cases cited by the SPO reflect the minority opinion.[183] The Defence avers that the term "commission" must be interpreted according to Kosovo law and is limited to co-perpetration.[184] The Defence further submits that the 2020 Serbian CC Judgment also applies to JCE, in the sense that none of its forms formed part of Kosovo domestic law at the time of the alleged crimes.[185]

70. As regards customary international law, the Defence reiterates some of their arguments in their respective replies and maintains that the cases relied upon by the SPO to evidence the application of JCE III have all been dismissed by the ECCC for inconclusiveness or irrelevance.[186] The Defence further submits that decisions of international tribunals issued after the facts in the Indictment cannot be relied upon as evidence of customary international law for the existence of JCE at that time.[187] The Defence also avers that the ICC Statute may be taken to express the *opinio juris* of the States that support it.[188]

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[181] Veseli JCE Reply, para. 34.
[182] Selimi JCE Reply, para. 22; Krasniqi JCE Reply, paras 10-11.
[183] Selimi JCE Reply, paras 32-36; Veseli JCE Reply, para. 41.
[184] Veseli JCE Reply, paras 24-26.
[185] Veseli JCE Reply, paras 4-5.
[186] Selimi JCE Reply, paras 48-54, 61-67; Krasniqi JCE Reply, paras 13-41; Thaçi JCE Reply, paras 17-23; Veseli JCE Reply, para. 37.
[187] Selimi JCE Reply, para. 60.
[188] Thaçi JCE Reply, paras 24-25.

71. As regards foreseeability and accessibility, the Defence replies that the SPO's reference to the gravity of crimes is not directly relevant and what matters is whether liability on the basis of JCE for these crimes would be foreseeable.[189] The Defence further submits that the SPO's reliance on Article 26 of the SFRY Criminal Code is erroneous, as that provision was interpreted as basis for liability solely for the crimes which are carried out within the framework of a criminal design, thus narrower than JCE III.[190] The Defence also submits that Article 22 of the SFRY Criminal Code is the more general provision which provides for the attribution of liability among members of a group, but that there is no basis to assert that this provision demonstrates that JCE III liability was sufficiently foreseeable to the Accused at the time of the alleged crimes.[191] The Defence further maintains that the SPO's claim that flexibility in terminology must be permitted may be taken in consideration by international courts applying international law, but is categorically prohibited by the Constitution, which requires that all criminal laws should be introduced by way of legislated statute.[192]

72. As regards the principles of *in dubio pro reo*, *lex mitior* and culpability, the Defence reiterates their arguments in reply.[193] As regards special intent crimes, the Defence replies that whether a mode of liability can be applied to the crime charged is a jurisdictional issue and falls within the scope of Rule 97(1)(a) of the Rules.[194]

F. SUPERIOR RESPONSIBILITY

1. The Veseli Jurisdiction Motion

73. The Defence submits that the SC does not have jurisdiction to enforce superior responsibility because the domestic law applicable during the armed conflict did not

[189] Selimi JCE Reply, para. 39.
[190] Selimi JCE Reply, paras 44-47; Thaçi JCE Reply, para. 27.
[191] Thaçi JCE Reply, para. 28.
[192] Veseli JCE Reply, para. 42.
[193] Krasniqi JCE Reply, para 12; Thaçi JCE Reply, paras 14, 35-36; Veseli JCE Reply, para. 38.
[194] Veseli JCE Reply, paras 46-47.

recognise superior responsibility as a mode of liability.[195] The Defence further avers that even if customary international law were found to be applicable, the Pre-Trial Judge would still be obliged to consider whether international law or domestic law produces a result substantially more favourable to the Accused and to apply a more lenient regime.[196] The Defence maintains that applicable Kosovo law did not recognise superior responsibility and instead a form of commission by omission, provided in Article 30(2) of the SFRY Criminal Code, should be applicable.[197] The Defence further submits that, as a result of recent legal developments and case-law, the notion of superior responsibility has evolved towards a concept which is more in line with the principle of legality.[198]

2. The SPO CIL Response

74. The SPO responds that superior responsibility is a mode of liability that was recognised in customary international law in 1998 and the Pre-Trial Judge is not required to apply SFRY modes of liability or compare them to customary international law, as the latter applies before the SC. The SPO further submits that the Pre-Trial Judge should reject the Defence's challenge in respect of superior responsibility, as the remaining arguments concern contours of the superior responsibility doctrine and are not a proper jurisdictional challenge pursuant to Rule 97(1)(a) of the Rules.[199]

3. The Veseli CIL Reply

75. The Defence reiterates its arguments in reply and adds that it is incumbent upon the Pre-Trial Judge to ascertain the "modern" status of command responsibility in

[195] Veseli Jurisdiction Motion, paras 35-36.
[196] Veseli Jurisdiction Motion, paras 36, 120, 124.
[197] Veseli Jurisdiction Motion, paras 121-122.
[198] Veseli Jurisdiction Motion, paras 125-130.
[199] SPO CIL Response, paras 36-47.

customary international law and to compare it to any domestic law on command responsibility, thereby determining which is more beneficial to the Accused.[200]

III. APPLICABLE LAW

76. Pursuant to Rule 97(1) of the Rules, the Accused may file preliminary motions, which challenge the jurisdiction of the SC, allege defects in the form of the indictment and seek the severance of indictments pursuant to Rule 89(2).

A. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

77. Pursuant to Article 22 of the Constitution, human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: […] (2) ECHR; (3) ICCPR […].

78. Pursuant to Article 33 of the Constitution,

> 1. no one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.
>
> 2. No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed.
>
> 3. The degree of punishment cannot be disproportional to the criminal offense.

[200] Veseli CIL Reply, paras 36-40.

4. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator.

79. Pursuant to Article 3(2) of the Law, the SC shall adjudicate and function in accordance with,

a. the Constitution of the Republic of Kosovo,

b. this Law as the *lex specialis*,

c. other provisions of Kosovo law as expressly incorporated and applied by this Law,

d. customary international law, as given superiority over domestic laws by Article 19(2) of the Constitution, and

e. international human rights law which sets criminal justice standards including the ECHR and ICCPR, as given superiority over domestic laws by Article 22 of the Constitution.

80. Pursuant to Article 12 of the Law, the SC shall apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the ECHR and Article 15(2) of the ICCPR, as incorporated and protected by Articles 19(2), 22(2), 22(3) and 33(1) of the Constitution.

B. THE COUNCIL OF EUROPE REPORT

81. Pursuant to Article 162(1) of the Constitution, to comply with its international obligations in relation to the Council of Europe Report, the Republic of Kosovo may establish SC and a SPO within the justice system of Kosovo. The organisation,

functioning and jurisdiction of the SC and SPO shall be regulated by Article 162 of the Constitution and by a specific law.

82. Pursuant to Article 1(2) of the Law, SC within the Kosovo justice system and the SPO are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Report and which have been the subject of criminal investigation by the SITF.

83. Pursuant to Article 6(1) of the Law, the SC shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Report.

C. ARBITRARY DETENTION

84. Pursuant to Article 14(1)(c) of the Law, for the purposes of this Law, under customary international law during the temporal jurisdiction of the SC, war crimes means: […] in the case of an armed conflict not of an international character, serious violations of Common Article 3, including any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause […].

D. ENFORCED DISAPPEARANCE OF PERSONS

85. Pursuant to Article 13(1)(i) of the Law, for the purposes of this Law, under customary international law during the temporal jurisdiction of the SC, crimes against humanity means any of the following acts when committed as part of a widespread

or systematic attack directed against any civilian population, with knowledge of the attack: […] enforced disappearance of persons […].

E. JOINT CRIMINAL ENTERPRISE

86. Pursuant to Article 16(1)(a) of the Law, for crimes in Articles 13-14 of the Law, a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime.

F. SUPERIOR RESPONSIBILITY

87. Pursuant to Article 16(1)(c) of the Law, for crimes in Articles 13-14 of the Law, the fact that any of the acts or omissions were committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

IV. DISCUSSION

A. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

1. The Sources of Law Applicable Before the SC

88. The Pre-Trial Judge considers that the Veseli challenge with regard to customary international law revolves around the question which source (or sources) of law is (or are) applicable before the SC – customary international law, domestic law, or a combination thereof, when adjudicating crimes under its jurisdiction. More specifically, the Defence arguments relate to the identification of the applicable body of law against which the legality principle is to be assessed.

89. The Pre-Trial Judge considers that, while subject to the principles and safeguards provided in the Constitution, the Law is the principal legal text governing the mandate and functioning of the SC, containing also specific penal provisions. This is clearly reflected in Article 3(2) of the Law which, in establishing the legal sources applicable before the SC as well as their relationship, indicates that the Law is *lex specialis*. As a result, Article 3(2) of the Law stipulates that the SC shall adjudicate and function in accordance with:

a. the Constitution;

b. the Law, as *lex specialis*;

c. other provisions of Kosovo law to the extent they are expressly incorporated in the Law;

d. customary international law, as given superiority over domestic laws by Article 19(2) of the Constitution; and

e. international human rights law, as given superiority over domestic laws by Article 22 of the Constitution.

2. Whether Article 12 of the Law Violates the Principle of Non-Retroactivity

90. While the Law is *lex specialis* with regard to the mandate and functioning of the SC, its application, including reliance on customary international law, must still be in accordance with the constitutional safeguards, in particular the provision on non-

retroactivity, enshrined in Article 33 of the Constitution, Article 7 ECHR,[201] and Article 15 ICCPR.[202]

91. Article 12 of the Law, which is included in Chapter III entitled "Jurisdiction and Applicable Law", is the central provision establishing the legal framework for determining whether the charges brought by the SPO accord with the principle of legality and, by extension, whether they lawfully fall within the jurisdiction of the SC. The plain language of Article 12 of the Law sets customary international law as the source of reference, specifying that the substantive criminal law of Kosovo shall apply *only insofar as it is in compliance with* customary international law. The centrality of customary international law is confirmed by other references to this source of law, notably in Articles 3(2)(d), 3(2)(3), 13 and 14 of the Law, as opposed to the subsidiary role of domestic law (see Articles 3(4) and 12 of the Law).

92. The Veseli Defence submits that Article 33 of the Constitution, in conjunction with Article 7 ECHR, prevents the SC from exercising jurisdiction over crimes solely under customary international law, unless these crimes have been incorporated into Yugoslav domestic law applicable at the time of the charges.

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[201] Article 7 ECHR reads as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

[202] Article 15 ICCPR reads as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

93. The Pre-Trial Judge finds that the two limbs of Article 7 ECHR can only be read and interpreted together and in a concordant manner, as they complement each other.[203] In this perspective, Article 7(1) ECHR sets out the general rule on non-retroactivity, while Article 7(2) ECHR is simply a contextual clarification of the first paragraph, which was included mainly to protect the validity of post-World War II prosecutions of crimes committed during that armed conflict.[204]. The legal construction of Article 7 ECHR, therefore, implies that if an act or omission constitutes, pursuant to Article 7(1) ECHR, an offence under "international law", which encompasses both treaty law and customary international law, it is not necessary to make an assessment under Article 7(2) of the Convention.[205]

94. In light of the above, the issue before the Pre-Trial Judge is how to reconcile the reference to Article 7(2) ECHR in Article 12 of the Law, with the prohibition of non-retroactivity of criminal law and its exceptions, as foreseen under the Constitution and the ECHR, with a view to giving an effective interpretation to the legal framework as a whole. The Pre-Trial Judge considers, in this regard, that the reference to Article 7(2) ECHR in Article 12 of the Law does not bar the SC from relying on customary international law as a source criminalising a specific conduct, as the whole provision of Article 7 ECHR, as well as the entirety of the Convention, are anyway applicable before the SC, by virtue of Article 22 of the Constitution. Thus, the reference to Article 7(2) ECHR in Article 12 of the Law is to be read, more appropriately, as encompassing the totality of Article 7 ECHR, i.e. the whole construct of the principle of non-retroactivity properly understood under that provision and, by implication, under Article 33(1) of the Constitution (which mirrors Article 7 ECHR). In fact, the Pre-Trial Judge notes that Article 12 of the Law itself establishes a link with Articles 22

[203] ECtHR, *Vasiliauskas v. Lithuania* [GC] ("Vasiliauskas v. Lithuania [GC]"), no. 35343/05, Judgment, 20 October 2015, paras 188-189.
[204] ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, Judgment, 13 July 2013, para. 72.
[205] ECtHR, *Kononov v. Latvia* [GC] ("Kononov v. Latvia [GC]"), no. 36376/04, Judgment, 17 May 2010, paras 244-246.

and 33(1) of the Constitution, militating in favour of a more coherent and comprehensive interpretation of Article 12 of the Law, which takes into account the applicable human rights instruments. From the foregoing, it follows that the SC shall always apply the entirety of Article 7 ECHR when assessing the legality principle, and that customary international law may therefore be considered a permissible criminalising source. In this sense, the Defence argument that Article 7(2) ECHR has fallen into desuetude is redundant and fails. The SC are required in any event to start their consideration from Article 7(1) ECHR when ascertaining the legality principle in each specific circumstance.

95. The same holds true for the reference in Article 12 of the Law to Article 15(2) ICCPR, which in fact establishes the same contours for the non-retroactivity principle and, accordingly, must be read as referring to the entirety of that provision, including the possibility to rely on customary international law as a criminalising source. The whole provision of Article 15 ICCPR is, in any event, applicable before the SC, as is the ICCPR in its entirety, by virtue of Article 22 of the Constitution.

96. The above interpretation of the interplay between Article 12 of the Law, the Constitution and the applicable human rights instruments is, in the view of the Pre-Trial Judge, the only interpretation that reconciles all the relevant provisions at stake by giving them an *effet utile*, thus making sense of the (national and international) legal order in which the SC are placed.

97. The arguments of the Veseli Defence in relation to the applicability of domestic law stem from the proposition that the SC is a domestic court and, accordingly, cannot but apply the domestic law in force at the time of the alleged commission of the crimes. The Pre-Trial Judge also notes the arguments that the 2020 Serbian CC Judgment, in conjunction with the Expert Opinion, provide definitive legal guidance concerning the scope of the (domestic) criminal law applicable to crimes under the SC jurisdiction and on the constitutional prohibition to hold someone responsible for crimes only

under international law, not explicitly transposed into written domestic law applicable to Kosovo at the time of commission.

98. In the view of the Pre-Trial Judge, the exercise of categorising a court of law as domestic, international, hybrid, or otherwise, is not dispositive of the law it shall apply when adjudicating cases. In the case of the SC, the Kosovar legislator established a specialised court within the meaning of Article 103(7) of the Constitution, in fulfilment of Kosovo's international obligations arising out of the Exchange of Letters.[206] In so doing, the Kosovar legislator decided to provide the SC with a particular applicable law, as reflected in Article 3(2) of the Law.

99. As discussed above, the applicable law chosen by the Kosovar legislator for the SC comprises, first, customary international law and, second, domestic Kosovo law only insofar as it is expressly incorporated in the Law, as stipulated by Article 3(2)(c) and (4) of the Law. The domestic law referred to in the Law may apply directly to crimes under Article 15 of the Law and may apply to international crimes under Article 13 and 14 of the Law only insofar as it is in compliance with customary international law, as stipulated by Article 12 of the Law. This, in turn, means that the SFRY Constitution and the SFRY Criminal Code do not limit the jurisdiction of the SC in the manner suggested by the Defence. Thus, for the purposes of the proceedings before the SC, customary international law is and remains the primary source of law in accordance with the Constitution and the Law.

100. In this perspective, the Pre-Trial Judge underscores that the SC are not bound to follow judicial precedents from other jurisdictions and the interpretation given in the 2020 Serbian CC Judgment is not binding on the Pre-Trial Judge. The same holds true for the Expert Opinion, which has no binding force over the SC. Moreover, contrary

[206] Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318* ("Constitutional Court Judgment"), KO 26/15, Judgment, 15 April 2015, public, paras 37, 39.

to the Defence's contention, it is wholly conceivable that different jurisdictions, including jurisdictions originating from the same predecessor entity, prosecute persons allegedly responsible for crimes occurred during the same armed conflict, pursuant to different laws, in the exercise of their authority to enact and implement the laws they deem appropriate.

101. In light of the above considerations, the Pre-Trial Judge finds that the essence of the provisions of Article 7 ECHR and Article 15 ICCPR, as reflected in Article 33(1) of the Constitution, lies in the authority of the Kosovar legislator to lawfully adopt domestic legislation explicitly providing for international crimes already existing under customary international law at the material time. In so doing, the legislator can allow – or even mandate – prosecution for conduct that took place before the penalisation was introduced in domestic written law. In such cases, there is actually no issue of retroactivity: the legislator is simply transposing (into its own domestic written legislation) crimes that were already part of the legal order, and that were binding on individuals, according to international law, at the time of the alleged commission of the charged crimes.

102. Therefore, the Pre-Trial Judge concludes that the SC shall apply at all times customary international law. The Pre-Trial Judge further concludes that, other than the Law itself, no other piece of domestic legislation is applicable before the SC unless expressly incorporated in the Law, as provided for in Article 3(2)(c) and (4) of the Law, and, with regard to crimes under Articles 13 and 14 of the Law, only insofar as such domestic legislation, or part thereof, is in compliance with customary international law.

3. Whether Customary International Law was Accessible and Foreseeable

103. Regarding the accessibility and foreseeability to the Accused of customary international law at the time of the alleged commission of the crimes, the Pre-Trial

Judge recalls that all Accused held high-ranking positions within the KLA, with a vast set of responsibilities and powers that allowed them to access a variety of public information and knowledge.[207]

104. In this context, and in light of the post-World War II general legal framework,[208] the ongoing ICTY prosecutions at the time,[209] the relevant international treaties ratified by the SFRY,[210] and the prohibitions set out in the SFRY Criminal Code (some of which mirror the crimes charged),[211] the Pre-Trial Judge finds that it was at the relevant time accessible and foreseeable to the Accused that the underlying conduct, as charged, could constitute crimes under international law and that involvement in such conduct may give rise to individual criminal responsibility.

4. The Applicability and Scope of the *Lex Mitior* Principle

105. Regarding the Veseli Defence's arguments on the *lex mitior* principle, the Pre-Trial Judge recalls that the *lex mitior* principle applies before the SC, by virtue of Article 33 of the Constitution and Article 7 ECHR. It does so in respect of substantive criminal law only, as opposed to procedural law, such that a change in the substantive criminal law with retroactive application to the detriment of the Accused is in

[207] Confirmation Decision, paras 455-472.
[208] Nuremberg Charter (acceded to by the SFRY on 29 September 1945), Article 6; CCL10, Article II; International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, 1950, Principle II.
[209] According to the records available on the ICTY website, cases were ongoing against already a few dozens of persons at the time of the charges as set forth in the Indictment.
[210] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 ("APII"); Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, 26 November 1968.
[211] Article 142 SFRY Criminal Code includes, for example, killing, torture, inhuman treatment, and illegal arrests and detention.

violation of the aforementioned provisions.[212] By the same token, an Accused shall benefit from a subsequent change in the substantive criminal law, when either the charged conduct ceases to be criminal after it occurred (*abolitio criminis*) or when the constitutive elements of a charged crime and/or mode of liability are amended to the Accused's benefit.[213]

106. However, the Pre-Trial Judge observes that the issue of the applicability of such principle is not jurisdictional in nature. It concerns, rather, the proper identification, in case of conflict, of which law should be resorted to by a panel as the more favourable to the Accused.[214] Moreover, this does not have a direct bearing on the issues dealt with in this litigation, as the only subsequent, applicable source of law that can be assessed to find a more favourable law, if any, is customary international law, to the extent that it would evolve to the benefit of the Accused. The Pre-Trial Judge also notes that customary international law, being the result of the State practice coupled with relevant *opinio juris*,[215] can evolve over time, to the detriment or to the benefit of an accused person, potentially triggering the need to consider, and apply, the more favourable rule of customary international law. Accordingly, the Defence arguments on this point fail.

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[212] ECtHR, *G. v. France*, no. 15312/89, Judgment, 21 September 1995, para. 26; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 18 October 2000, paras 148-149; ECmHR, *X. v. the United Kingdom*, no. 6683/74, *Decision*, 10 December 1975, p. 96.
[213] ECtHR, *Scoppola v. Italy*, no. 10249/03, Judgment, 17 September 2009, paras 109-110.
[214] *See similarly* ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Appeals Chamber, Judgement on Sentencing Appeal, 4 February 2005, para. 80.
[215] *See for example* ICJ, *Asylum Case (Colombia v. Peru)* ("Asylum Case"), I.C.J. Reports 1950 (p. 266), Judgment, 20 November 1950, pp 14-15; *Fisheries Case (United Kingdom v. Norway)* ("Fisheries Case"), I.C.J. Reports 1951 (p. 116), Judgment, 18 December 1951, p. 131; *North Sea Continental Shelf Case (Denmark/the Netherlands v. Federal Republic of Germany)* ("North Sea Continental Shelf Case"), I.C.J. Reports 1969 (p. 3), Judgment, 20 February 1969, para. 77; *Continental Shelf Case (Libya v. Malta)* ("Continental Shelf Case"), I.C.J. Reports 1985 (p. 13), Judgment, 3 June 1985, para. 27; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* ("Nicaragua Case"), I.C.J. Reports 1986 (p. 14), Judgment, 27 June 1986, para. 183; *Jurisdictional Immunities of the State (Germany v. Italy)* ("Jurisdictional Immunities Case"), I.C.J. Reports 2012 (p. 99), Judgment, 3 February 2012, para. 55.

B. THE COUNCIL OF EUROPE REPORT

1. The Relationship with the Council of Europe Report

(a) The wording of Article 162(1) of the Constitution and Article 6(1) of the Law

107. The Pre-Trial Judge observes that the reference to the Council of Europe Report in Article 162(1) of the Constitution is preceded by the words "in relation to". This term may be defined as "with regard to, in respect of".[216] Article 6(1) of the Law similarly prefaces the reference to the Council of Europe Report with the words "related to".[217] This term has a nearly identical meaning, namely "[c]onnected or having relation to something else".[218]

108. In combination, the plain meaning of these terms expresses that, in the exercise of the jurisdiction of the SC, a correlation between the charges against an individual and the Report must exist. However, on account of these terms' general scope, such charges need not be confined to the allegations specifically set forth in the Report. This would constitute a very particular limitation and, as such, would have had to be reflected through specific wording in both the Constitution and the Law.[219]

109. The Pre-Trial Judge further notes the scope of the jurisdictional provisions of the Law. The SC have jurisdiction over, *inter alia*, a range of crimes against humanity and war crimes (subject-matter jurisdiction).[220] In addition, the SC have jurisdiction over crimes within its subject-matter jurisdiction which occurred between 1 January 1998 and 31 December 2000 (temporal jurisdiction) and which were either commenced or

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[216] *Oxford English Dictionary*, relation, n., Oxford University Press 2021.
[217] Article 1(2) of the Law similarly provides, in the relevant part, that SC within the Kosovo justice system and the SPO are necessary to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Report. *See also* paras 120-121 below.
[218] *Oxford English Dictionary*, related, adj. and n, Oxford University Press 2021.
[219] This could have been expressed, for instance, through a requirement that any charges must not exceed the allegations of organ trafficking and inhumane treatment in detention centres in Albania.
[220] Law, Articles 6, 13 and 14.

committed in Kosovo (territorial jurisdiction).[221] Lastly, in addition to its territorial jurisdiction, the SC have jurisdiction over, *inter alia,* persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever those crimes were committed (personal jurisdiction).[222]

110. Read in combination, these provisions evidently permit the SC to exercise its jurisdiction over charges that may include, but certainly extend beyond, organ trafficking and inhumane treatment allegedly committed in detention centres in Albania. This means that an interpretation of the terms "in relation to" and "relate to" in the context of the jurisdictional provisions of the Law lends further support to the aforementioned conclusion. If, in the exercise of the jurisdiction of the SC, the charges brought against an individual would have to be confined to allegations of organ trafficking and inhumane treatment in detention centres in Albania, as the Defence alleges, such a limitation would have had to be reflected consistently in the jurisdictional parameters defined by the Law. This discrepancy cannot be explained away by asserting that the jurisdictional provisions are simply broader than the reference to the Council of Europe Report. If the references to the Council of Europe Report would entail the narrowing effect claimed by the Defence, the jurisdictional provisions could not be put into effect insofar as they exceed allegations of organ trafficking and inhumane treatment in detention centres in Albania. This would render the jurisdictional provisions largely meaningless.

111. It follows that, in view of the plain meaning of the terms "in relation to" and "related to" interpreted in the context of the jurisdictional provisions of the Law, Article 162(1) of the Constitution and Article 6(1) of the Law require that, in the exercise of the jurisdiction of the SC, a correlation between the charges brought against an individual and the Council of Europe Report must exist, while stopping short of necessitating that such charges be limited to allegations of organ trafficking and

[221] Law, Articles 7 and 8.
[222] Law, Article 9(2).

inhumane treatment in detention centres in Albania. On this basis, these provisions are appropriately interpreted as requiring that charges brought against an individual in the exercise of the jurisdiction of the SC must be sufficiently connected to the Report.[223] Having regard to the nature of the findings adopted in the Council of Europe Report, the Pre-Trial Judge considers that such a connection may be based on, but is not limited to, a combination of the following factors: the perpetrators,[224] the victims,[225] the location(s),[226] the time frame,[227] the *modus operandi*,[228] the nature of the conduct,[229] the intent behind the conduct,[230] and the context of the conduct[231].[232] This determination cannot be made on the basis of a single factor considered in isolation, but requires an assessment as to whether, in the circumstances of each case, a

[223] While mindful of the differences, the Pre-Trial Judge observes that the ICC requires a similar correlation between a case and the scope of the referred situation, *see* ICC, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-1, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, para. 6; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-451, Pre-Trial Chamber I, Decision on the "Defence Challenge to the Jurisdiction of the Court", 26 October 2011, para. 16.

[224] *See for instance* Council of Europe Report, paras 5, 7, 58, 67, 68, 70, 72, 82, 84, 86, 95, 97, 98, 101, 102, 103, 104, 114, 129, 130 (referring to members of the KLA as the alleged perpetrators of crimes).

[225] *See for instance* Council of Europe Report, paras 4, 14 (footnotes 11-12), 103, 111, 139, 144 (describing the victims as persons of Serbian ethnicity and persons of Albanian ethnicity considered to be "traitors" or "collaborators" or having fallen victim to internal rivalries within the KLA).

[226] *See for instance* Council of Europe Report, paras 36, 38, 72, 74, 85, 87, 105, 108, 115, 130, 144 (specifying that the alleged crimes occurred throughout Kosovo and in parts of Albania).

[227] *See for instance* Council of Europe Report, paras 4, 56, 72, 102, 129 (indicating that the alleged crimes took place from 1998 and continued after the summer of 1999).

[228] *See for instance* Council of Europe Report, paras 72, 74, 98, 137, 138, 153-155 (setting out how the KLA allegedly targeted victims throughout Kosovo and Albania, including by abducting or apprehending persons and taking them to a network of detention facilities where they were interrogated and/or subjected to ill-treatment).

[229] *See for instance* Council of Europe Report, paras 13, 25, 26, 31, 35, 37, 45, 53, 73, 95, 104 (describing that crimes were committed by the KLA as a non-State actor, which had been shaped according to the hierarchies, allegiances and codes of honour prevailing in the Albanian clan structure, and which maintained links to organised crime and intelligence structures in Albania).

[230] *See for instance* Council of Europe Report, paras 4, 129, 139 (finding that the alleged crimes were perpetrated against individuals because of, *inter alia,* their activities, beliefs and/or ethnicity).

[231] *See for instance* Council of Europe Report, paras 4, 29, 89, 90, 95, 102, 103, 105, 106, 111, 139 (placing the alleged crimes in the context of the non-international armed conflict in Kosovo, and the pattern and strategy of targeting persons on account of their ethnicity and/or political affiliation).

[232] In addition, the Pre-Trial Judge has had regard, *mutatis mutandis,* to Article 1 of the STL Statute, which lays down similar factors for establishing a connection between the main attack falling within its jurisdiction and other attacks, namely criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

combined assessment of these factors yields a sufficient connection between the charges brought against an individual in the exercise of the jurisdiction of the SC and the Council of Europe Report. Consequently, if such a connection can be established and the jurisdictional prerequisites under Articles 6-9 and 12-16 of the Law have been fulfilled, the SC may, in the exercise of its jurisdiction, conduct proceedings regarding charges exceeding the allegations explicitly discussed in the Report.

112. Therefore, the submissions of the Defence contradict the plain meaning of Article 162(1) of the Constitution and Article 6(1) of the Law read in the context of the jurisdictional provisions of the Law.[233] These submissions are, thus, dismissed.

(b) The debates in the National Assembly

113. The Pre-Trial Judge considers that the Defence's assertion regarding the debates in the National Assembly is unsubstantiated in the absence of supporting references to any such specific debates. In addition, as the SITF had disclosed that it had not confined its investigation to allegations of organ trafficking and inhumane treatment in detention centres in Albania prior to the adoption of Constitutional Amendment No. 24 and the Law,[234] the National Assembly would have specifically set out such a limitation had it sought to do so.

114. In any event, the Pre-Trial Judge observes that, irrespective of the specific legal basis underpinning its assertion, the Defence recognises that the drafting history may be invoked if the provision in question is unclear.[235] However, as set out above, the plain meaning of the terms "in relation to" and "relate to" in Article 162(1) of the Constitution and Article 6(1) of the Law, interpreted in the context of the jurisdictional

[233] Thaçi Jurisdiction Motion, paras 9-10, 13-22, 28; Selimi Jurisdiction Motion (Discrimination), para. 4; Krasniqi Jurisdiction Motion, paras 57-60, 62, 67.
[234] UN Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II*, S/2014/558, 1 August 2014 ("UNMIK Report").
[235] Thaçi Jurisdiction Motion, para. 29.

provisions of the Law, excludes a limitation to charges regarding allegations of organ trafficking and inhumane treatment in detention centres in Albania, thus obviating the need to resort to the drafting history.

115. For these reasons, the assertions of the Defence fall to be dismissed.[236]

(c) The jurisdiction of ICTY and other courts

116. The Pre-Trial Judge observes that the SITF was mandated to investigate and, if warranted, prosecute individuals for crimes alleged in the Council of Europe Report.[237] Its mandate was evidently defined independently from the jurisdiction of the ICTY or any courts in Kosovo. Similarly, neither Constitutional Amendment No. 24 nor the Law refers to the jurisdiction of the ICTY or any courts in Kosovo in connection with the jurisdictional parameters of the SC.

117. Moreover, when interpreted in the context of Article 17(b) and (c) of the Law, which provides that no person shall be tried before the SC for acts for which he or she has already been tried by a court in Kosovo or the ICTY, it is clear that the jurisdictional provisions of the Law cannot be read as entirely excluding any overlap with the jurisdiction of the ICTY or a court in Kosovo. If an overlap would not be possible, such a provision would not have been included. This is further confirmed by the fact that Article 54(1) of the Law stipulates that the SC have primacy within its subject-matter jurisdiction over all other courts in Kosovo. As to the Defence's assertion that Article 17 of the Law is superfluous, the mere inclusion of a provision signals that it has a function. In any event, whereas Article 34 of the Constitution is worded generally, Article 17 of the Law serves to specify the *non bis in idem* principle in relation to the SC and, *inter alia,* the ICTY.

[236] Thaçi Jurisdiction Motion, paras 29-30; Selimi Jurisdiction Motion (Discrimination), para. 4.
[237] SITF, *Factsheet*. The SITF also indicated that it would conduct a thorough criminal investigation looking at the whole range of crimes in the Council of Europe Report.

118. Lastly, the Pre-Trial Judge notes that, in concluding that the establishment of the SC was in compliance with Article 103(7) of the Constitution, the Constitutional Court referred to "a number of highly specific criminal allegations" outlined by the Council of Europe Report.[238] This general description does not exclude allegations arising from the Report exceeding organ trafficking and inhumane treatment allegedly committed in detention centres in Albania. The Constitutional Court's reference to the ECtHR's finding that "fighting corruption and organised crime may well require measures, procedures and institutions of a specialised character" does not affect this conclusion.[239] The reference to corruption, which is a crime that has no direct relationship to the Report, establishes that the Constitutional Court invoked this case to illustrate, in general, that, under Article 6(1) ECHR, special courts may be set up for a number of purposes provided that such courts have a basis in law. This is further confirmed by the fact that the Constitutional Court, in the same context, generally referred to the establishment of the SC "for the purpose of fighting specific crimes".[240]

119. It follows that neither the Constitution nor the Law give rise to the limitations identified by the Defence and, consequently, these arguments must be set aside.[241]

(d) Article 1(2) of the Law

120. The Pre-Trial Judge finds that Article 1 of the Law does not impose a jurisdictional limitation since it is restricted to defining the Law's scope and purpose.

121. In any event, the Pre-Trial Judge reiterates that the Law was adopted after the SITF had publicly disclosed that its investigation had not been limited to the allegations of organ trafficking and inhumane treatment in detention centres in

[238] Constitutional Court Judgment, para 51.
[239] Constitutional Court Judgment, para. 52, referring to ECtHR, *Fruni v. Slovakia*, no. 8014/07, Judgment, 21 June 2011.
[240] Constitutional Court Judgment, para. 71.
[241] Thaçi Jurisdiction Motion, paras 31-32; Krasniqi Jurisdiction Motion, paras 63, 65(a), 66.

Albania.[242] Therefore, any reference to this investigation does not imply the limitation suggested by the Defence. Accordingly, these arguments are dismissed.[243]

(e) Human Rights Law

122. The Pre-Trial Judge considers that the interpretation set forth above constitutes the only proper legal construction of the references of the Council of Europe Report in Article 162(1) of the Constitution and Article 6(1) of the Law.

123. Therefore, this interpretation does not give rise to ambiguity and the Defence's submission is, accordingly, rejected.[244]

2. The Scope of the Council of Europe Report

(a) The framework of the alleged criminal activity

124. At the outset, the Pre-Trial Judge notes that, although the Council of Europe Report contains a series of factual allegations characterising the criminal activity, it does not claim to authoritatively and exhaustively classify those allegations legally, let alone delineate the subject-matter jurisdiction of the SC. Indeed, the Council of Europe Report originates from a non-judicial body and its author explicitly specified that he lacked the mandate to conduct a criminal investigation.[245] Therefore, whether or not an act or omission qualifies as an international crime must be determined by a court of law on the basis of the evidence before it.

125. In any event, the Pre-Trial Judge observes that the Council of Europe Report makes reference to the contextual elements for war crimes and crimes against

[242] UNMIK Report, Annex II.
[243] Thaçi Jurisdiction Motion, paras 25-26; Krasniqi Jurisdiction Motion, paras 64, 67.
[244] Krasniqi Jurisdiction Motion, para. 65(d).
[245] Council of Europe Report, paras 21, 175.

humanity, namely the existence of an armed conflict,[246] and a pattern and strategy of targeting persons on account of their ethnicity and/or political affiliation[247]. Therefore, the Report's findings that various (international) crimes were allegedly perpetrated, including killings, unlawful detention, torture, inhuman and degrading treatment, and enforced disappearances,[248] cannot be dissociated from the findings establishing the context in which this conduct took place.

126. In addition, the Pre-Trial Judge notes that the Council of Europe Report contains specific allegations that international crimes have been perpetrated, which evidently exceed background references. In particular, the part entitled "detention facilities and inhuman treatment of captives" begins by describing some of the general characteristics of KLA detentions in wartime and states that some of these detentions seem to meet the threshold for war crimes.[249] It logically follows that the ensuing findings on the "first subset of captives: the 'prisoners of war'" pertain entirely to allegations of war crimes.[250] This is further confirmed by the Council of Europe Report's more general references to war crimes.[251] In addition, with regard to "post-conflict detentions carried out by KLA members and affiliates", the Report finds that Kosovar Albanians continued to detain people for a variety of motives, including revenge, punishment and profit.[252] Therefore, organised criminal activity was not described as the sole motive and, coupled with findings that persons were targeted on account of their ethnicity,[253] this part of the Council of Europe Report concerns violations of human rights bearing the hallmarks of crimes against humanity.[254] The

[246] *See for instance* Council of Europe Report, paras 29, 95, 102, 103, 105, 106.
[247] *See for instance* Council of Europe Report, paras 4, 14 (footnotes 11-12), 89, 90, 103, 111, 139, 144.
[248] *See for instance* Council of Europe Report, paras 72, 74, 112, 120, 124, 131, 137, 147, 153, 155, 174.
[249] Council of Europe Report, para. 101.
[250] Council of Europe Report, paras 102-128.
[251] *See for instance* Council of Europe Report, summary (para. 2), draft resolution (para. 11), paras 7, 68, 113.
[252] Council of Europe Report, para. 129.
[253] Council of Europe Report, paras 4, 139.
[254] Council of Europe Report, paras 130-155.

fact that the Report distinguishes "victims of organised crime" as a separate subset of captives additionally confirms this reading.[255]

127. Moreover, the allegations in the Report may qualify as crimes against humanity and/or war crimes notwithstanding any references to organised criminal activity. It is recalled that, in general, motive is irrelevant in relation to criminal intent.[256] More specifically, there is no requirement that crimes against humanity must not have been committed for personal reasons.[257] Similarly, seeing as the nexus requirement regarding war crimes requires that the perpetrator must have acted in furtherance of or under the guise of the armed conflict,[258] the motive of a perpetrator does not necessarily exclude a nexus between his or her act and the armed conflict.

128. Thus, any findings that the perpetrators would have acted in the framework of organised criminal activity would not, without more, establish that the crimes they would have committed do not amount to crimes against humanity and/or war crimes. The relevant question is rather whether the evidence brought in the proceedings before the SC will reveal that, in relation to charges that have a sufficient connection with the Council of Europe Report, the contextual elements for crimes against humanity and war crimes, as well as the underlying crimes' material and mental elements, have been fulfilled.

[255] Council of Europe Report, paras 156-168.
[256] *See for instance* ICTY, *Prosecutor v. Tadić* ("Tadić Appeal Judgment"), IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, para. 269; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Chamber, Judgement, 28 February 2005, para. 106; ICTR, *Prosecutor v. Kanyarukiga*, ICTR-02-78-A, Appeals Chamber, Judgement, 8 May 2012, para. 262.
[257] *See for instance* Tadić Appeal Judgment, paras 248-251.
[258] *See for instance* ICTY, *Prosecutor v. Kunarac et al.* ("Kunarac Appeal Judgment"), IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, paras 57-59; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Chamber, Judgement, 26 May 2003, paras 569-570.

129. In sum, the Council of Europe Report is neither confined to allegations pertaining to organised criminal activity nor can its findings be limited to such allegations as a matter of law. Thus, the arguments of the Defence must be rejected.[259]

(b) The geographical parameters

130. The Pre-Trial Judge notes that, according to the Report, the KLA bases on the territory of Albania, with the support of powerful elements within the Albanian national intelligence apparatus, were used to support the KLA's armed activities in Kosovo, and most victims, who were targeted on account of their ethnicity or for being perceived to be "collaborators" or "traitors", were taken from Kosovo to Albania.[260]

131. In this regard, it is recalled that, in relation to crimes against humanity, a crime which is committed away from the main attack against the civilian population, including in another State, could still, if sufficiently connected, be part of that attack.[261] As concerns war crimes, a non-international armed conflict may spill over into a neighbouring State, thus triggering the application of the relevant rules of IHL, including Common Article 3.[262] In any case, persons protected under Common Article 3 as a result of a non-international armed conflict remain entitled to such protection even when they are relocated to a third State, considering that this provision provides that the enumerated acts shall remain prohibited in any place

[259] Thaçi Jurisdiction Motion, paras 39-41; Selimi Jurisdiction Motion (Discrimination), para. 4; Krasniqi Jurisdiction Motion, para 60.
[260] *See for instance* Council of Europe Report, paras 36, 38, 72, 74, 103, 105, 106, 108, 111, 115, 129, 130, 137, 139, 144.
[261] Kunarac Appeal Judgment, para. 100; MICT, *Prosecutor v. Šešelj*, MICT-16-99-A, Appeals Chamber, Judgment, 11 April 2018, para. 76; ICC, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, Pre-Trial Chamber III, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, 9 November 2017, para. 194.
[262] ICRC, *Commentary to GCIII*, 2020 ("2020 ICRC Commentary GCIII"), paras 502, 508-510 (Common Article 3).

whatsoever.[263] In line with the substantive law regarding crimes against humanity and war crimes, the SC have, pursuant to Articles 8 and 9 of the Law,[264] been granted jurisdiction over such crimes.[265]

132. Therefore, the references to the crimes allegedly committed in Albania cannot be considered in isolation from the events in Kosovo as they form part of the same attack against the civilian population and non-international armed conflict.

133. Furthermore, the Report contains several references to crimes allegedly committed in Kosovo without any connection to Albania. In particular, the Parliamentary Assembly of the Council of Europe called upon the Albanian authorities and the Kosovo administration to, separately from allegations regarding detention related crimes,[266] co-operate unreservedly with EULEX and the Serbian authorities in the framework of procedures intended to find out the truth about crimes committed in Kosovo.[267] In addition, the Council of Europe Report specifically discusses, *inter alia*, that: (i) Messrs Haliti, Veseli, Syla and Limaj, alongside Mr Thaçi and other members of his inner circle, have been implicated in having ordered – and in some cases personally overseen – assassinations, detentions, beatings and interrogations in various parts of Kosovo;[268] (ii) KLA factions and splinter groups that

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[263] *See similarly* ICC, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-138, Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, paras 74-75.

[264] Article 8 of the Law provides, in the relevant part, that the SC shall have jurisdiction over crimes within its subject matter jurisdiction which were either commenced or committed in Kosovo (emphasis added). Article 9 of the Law provides, in the relevant part, that in addition to its territorial jurisdiction set out in Article 8, the SC shall have jurisdiction over persons of Kosovo/FRY citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever those crimes were committed (emphases added).

[265] *See similarly* ICC, *Request under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, paras 62-79; *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, paras 42-62.

[266] Council of Europe Report, Draft Resolution, para. 19.5.2, 19.5.3.

[267] Council of Europe Report, Draft Resolution, para. 19.5.1.

[268] Council of Europe Report, para. 72.

had control of distinct areas of Kosovo were able to run organised criminal enterprises almost at will;[269] and (iii) KLA units from northern Albania were deployed into Kosovo with the ostensible objective of "securing the territory", but fuelled by an irrepressible anger, and even vengeance, towards anyone whom they believed had contributed towards the oppression of the ethnic Albanian people.[270]

134. Accordingly, the crimes alleged in the Council of Europe Report that have a connection with Albania were committed in the context of the same attack against a civilian population and non-international armed conflict in Kosovo, and, in addition, the Report also discusses alleged crimes without a direct connection to Albania. For this reason, the arguments of the Defence are rejected.[271]

(c) The temporal parameters

135. The Pre-Trial Judge finds it evident that the reference to "for the most part" expresses that the Council of Europe Report also includes acts that occurred prior to the summer of 1999.[272] Indeed, consistent with this understanding, the Report explicitly discusses crimes allegedly committed in this period.[273] More particularly, it is reported that a group of KLA members wrested control of most of the illicit criminal enterprises in which Kosovar Albanians were involved in Albania beginning at the latest in 1998.[274] This Drenica Group, allegedly led by Mr Thaçi, would have built a formidable power base in the organised criminal enterprises in Kosovo and Albania with the support of formal Albanian governance structures, Albania's secret services and the Albanian mafia, and operated mostly from Albania throughout the hostilities

[269] Council of Europe Report, para. 85.
[270] Council of Europe Report, para. 87.
[271] Thaçi Jurisdiction Motion, paras 34-36; Selimi Jurisdiction Motion (Discrimination), para. 4; Krasniqi Jurisdiction Motion, para 59.
[272] Council of Europe Report, para. 4.
[273] Council of Europe Report, paras 36, 41-63.
[274] Council of Europe Report, para. 56.

in Kosovo and beyond.[275] In addition, the Report details that certain KLA members have been implicated in having ordered – and in some cases personally overseen – different crimes in various parts of Kosovo and in the context of KLA-led operations on the territory of Albania between 1998 and 2000.[276] It also sets out that, with the support of powerful elements within the Albanian national intelligence apparatus, KLA camps on Albanian territory were used to support the KLA's armed activities in Kosovo, and that the detention of individuals in these camps were based on the strategic imperatives of fighting the conflict in Kosovo between April and June 1999.[277]

136. Consequently, the Council of Europe Report is explicitly concerned with alleged crimes and events pertaining to the contextual elements for war crimes and crimes against humanity, which occurred as of, at least, 1998, as appropriately reflected in the temporal jurisdiction of the SC in Article 7 of the Law. Therefore, any charges relating to the period from 1998 to the summer of 1999 that, in the exercise of the jurisdiction of the SC, are brought against an individual accord fully with the Report. The argument of the Defence must, accordingly, be dismissed.[278]

(d) The personal parameters

137. In the view of the Pre-Trial Judge, the Council of Europe Report, while naming certain individuals, such as Mr Thaçi and Mr Veseli,[279] refers to other alleged perpetrators in open-ended terms. It, for instance, identifies members of Mr Thaçi's Drenica Group, members of Mr Thaçi's inner circle, KLA members and affiliates, and orchestrators of the post-conflict criminal enterprise as alleged perpetrators.[280]

[275] Council of Europe Report, paras 57-63.
[276] Council of Europe Report, para. 72.
[277] Council of Europe Report, paras 102-114.
[278] Thaçi Jurisdiction Motion, paras 37-38; Selimi Jurisdiction Motion (Discrimination), para. 4; Krasniqi Jurisdiction Motion, para 58.
[279] *See for instance* Council of Europe Report, paras 58, 67, 68, 70, 72, 82, 84, 86, 104, 114.
[280] *See for instance* Council of Europe Report, summary (paras 1, 2), paras 5, 7, 68, 70, 72, 95, 97, 98, 101, 102, 103, 129, 130.

Accordingly, it does not purport to define a conclusive list in this regard. This is further confirmed by the absence of a mandate for the author of the Council of Europe Report to conduct a criminal investigation.[281] Similarly, the mandate of the SITF was, as set out above, not limited to specified individuals either.

138. Thus, the Report is not confined to alleged perpetrators identified by name and, consequently, the arguments of the Defence must be set aside.[282]

3. Conclusion

139. The Defence's submissions are based on an erroneous legal assessment and an incorrect reading of the scope of the Council of Europe Report. The plain meaning of the terms "in relation to" and "relate to" in Article 162(1) of the Constitution and Article 6(1) of the Law, interpreted in the context of the jurisdictional provisions of the Law, require a sufficient connection between charges brought against individuals in the exercise of the jurisdiction of the SC and the Council of Europe Report. In addition, appraised accurately, the Council of Europe Report extends to: (i) alleged international crimes, including crimes against humanity and war crimes, that have been perpetrated against persons on account of their ethnicity or for being perceived as "collaborators" or "traitors"; (ii) alleged crimes in Kosovo with and without a connection to Albania; (iii) alleged crimes committed from 1998 onwards; and (iv) alleged perpetrators that were or had been members of, or affiliated with, the KLA without any limitation to those explicitly identified as such.

140. In confirming the Indictment, the Pre-Trial Judge determined, *inter alia,* that there is a well-grounded suspicion within the meaning of Article 39(2) of the Law and Rule 86(4) and (5) of the Rules that: (i) the Accused were or had been members of the

[281] Council of Europe Report, paras 21, 175.
[282] Selimi Jurisdiction Motion (Discrimination), para. 4; Krasniqi Jurisdiction Motion, para. 68(c).

KLA, and some of them subsequently held other positions;[283] (ii) the Accused allegedly perpetrated the crimes together with other persons and other KLA members;[284] (iii) the victims were individuals perceived to have been collaborating or associating with FRY forces or officials or State institutions, or otherwise not supporting the aims or means of the KLA and later of the Provisional Government of Kosovo, including persons associated with the Democratic League of Kosovo and persons of Serbian, Roma, and other ethnicities;[285] (iv) the acts occurred in different locations in Kosovo and Albania;[286] (v) the acts were committed between at least March 1998 and September 1999;[287] (vi) a wide range of violent acts amounting to various crimes falling within Articles 13 and 14 of the Law were perpetrated;[288] (vii) the acts were perpetrated with a view to gaining and exercising control over Kosovo in its entirety;[289] and (viii) the acts were committed in the context of an attack against the civilian population and a non-international armed conflict.[290]

141. These findings address the relevant factors for determining whether, in the exercise of the jurisdiction of the SC, any charges are sufficiently connected to the Council of Europe Report, namely the perpetrators, the victims, the location(s), the time frame, the *modus operandi,* the nature of the conduct, the intent behind the conduct, and the context of the conduct. Consequently, even though the matter under consideration had not been explicitly raised for determination and there was no compelling reason for the Pre-Trial Judge to do so *proprio motu,* the Confirmation Decision, proceeding on the basis of the correct legal test and an accurate appraisal of

[283] Confirmation Decision, paras 455, 460, 464, 468.
[284] Confirmation Decision, paras 452.
[285] Confirmation Decision, paras 124, 126.
[286] Confirmation Decision, paras 41, 42, 125, 127.
[287] Confirmation Decision, paras 39, 125, 134-136.
[288] Confirmation Decision, paras 32, 33, 139-444.
[289] Confirmation Decision, paras 453-454.
[290] Confirmation Decision, paras 125, 129, 131, 137, 446-450.

the scope of the Council of Europe Report, amply demonstrates the existence of such a connection.

142. Accordingly, the Pre-Trial Judge dismisses the Thaçi Jurisdiction Motion and the Krasniqi Jurisdiction Motion insofar as it is argued that the charges in the Indictment, in their entirety or in part, do not relate to the allegations arising from the Council of Europe Report.

C. THE SUBJECT MATTER JURISDICTION

1. Arbitrary Detention as a War Crime in Non-International Armed Conflict

(a) The scope of Article 14(1)(c) of the Law

143. Article 14(1) of the Law enumerates several types of conduct constituting war crimes "under customary international law during the temporal jurisdiction" of the SC. The Law, therefore, sets out a list of conduct that the Kosovar legislator has identified as criminalised under customary international law between 1 January 1998 and 31 December 2000. In this respect, the Pre-Trial Judge recalls his findings that, when adjudicating crimes under Article 13 and 14 of the Law committed during its temporal jurisdiction, the SC shall apply customary international law, and Kosovo legislation only as expressly incorporated in the Law and insofar as it is in compliance with customary international law.[291] It is therefore against customary international law that the Pre-Trial Judge assesses whether or not arbitrary detention constituted a war crime in non-international armed conflict during the temporal scope of the Indictment.

144. The Pre-Trial Judge observes that, when listing the different war crimes under the SC jurisdiction, Article 14(1)(a) and (c) of the Law employs the wording "including any of the following acts", while paragraphs (b) and (d) of the same provision use the similarly open-ended formulation "including, but not limited to, any of the following

[291] *See* para. 102 above.

acts". The Veseli Defence raises a discrepancy between the Albanian and the English versions of Article 14(1)(c) of the Law, arguing that the Albanian version uses an exhaustive formulation and that the English version is incorrect, and should therefore be disregarded. Having verified the texts of Article 14(1)(c) of the Law in the English, Albanian, and Serbian versions (all being authoritative pursuant to Article 162(9) of the Constitution), the Pre-Trial Judge finds no discrepancy between these versions: they all similarly and consistently employ an open-ended formulation.[292] Therefore, no issue of language discrepancy arises in relation to Article 14 of the Law, and the formulation used by this provision in paragraphs (1)(a) and (c), on the one hand, and (1)(b) and (d), on the other hand, albeit worded differently, have a similarly non-exhaustive meaning.

145. Accordingly, the Pre-Trial Judge finds that the non-exhaustive formulations in Article 14 of the Law indicate that the war crimes falling under the SC jurisdiction, whether committed in international armed conflict or non-international armed conflict, are not necessarily confined to those expressly numerated in Article 14 of the Law. Nevertheless, the open formulation of Article 14 of the Law does not translate into an unlimited and unfettered jurisdiction over *any* war crime, at the Specialist Prosecutor's discretion. In order to exercise jurisdiction over a war crime that is not expressly enumerated in Article 14 of the Law, such crime must have existed under customary international law at the time of its alleged commission, in conformity with Articles 3(2)(d) and 12 of the Law.

146. Therefore, the Pre-Trial Judge finds that Article 14 of the Law, read in conjunction with Articles 3(2)(d) and 12 of the Law, provides a sound legal basis to exercise jurisdiction over war crimes under customary international law, including beyond those customary war crimes expressly listed in the Law.

[292] The same holds true for paragraphs (b) and (d) of Article 14(1) of the Law. *See* email from Language Service Unit, 25 June 2021, at 09:30.

147. Having established that the legal framework of the SC allows for – and actually requires – the exercise of jurisdiction over war crimes under customary international law, the Pre-Trial Judge will determine, in light of the Parties' submissions, whether arbitrary detention constitutes a serious violation of IHL, including Common Article 3, and whether it gave rise to individual criminal responsibility under customary international law during the temporal scope of the Indictment.

(b) Whether arbitrary detention is a serious violation of IHL

148. The Pre-Trial Judge must first determine whether any or some forms of deprivation of liberty in non-international armed conflict constitute a serious violation of IHL, in particular of Common Article 3.[293] In order to do so, it is necessary to determine whether a legal basis for deprivation of liberty exists under IHL applicable to these types of armed conflicts.

149. At the outset, the Pre-Trial Judge considers that, under IHL in general, deprivation of liberty in non-international armed conflict may take at least two distinct forms, provided that they are related to the armed conflict: (i) as a result of criminal proceedings against a person (criminal detention); and (ii) based on security grounds (internment).[294] This is clearly suggested by the references to "detention" in Common Article 3[295] and to "detention" and "internment" throughout Article 5 APII,[296] as well

[293] Reference to the provisions of APII is made only for the purpose of interpreting IHL contextually and to the extent that such provisions reflect customary IHL applicable at the time, and not because the Pre-Trial Judge considers APII to be applicable as treaty law, even though the former SFRY ratified APII in 1978. The Pre-Trial Judge has not made any finding that the non-international armed conflict in the Indictment satisfied the threshold provided for in APII.

[294] ICRC, *Commentary to APII*, 1987 ("1987 ICRC Commentary APII"), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475para. 4568 (Article 5).

[295] 2020 ICRC Commentary GC III, paras 754-755 (Common Article 3).

[296] APII, Article 5(1), 5(2) (referring to obligations borne by those "who are responsible for the internment or detention", 5(3) (referring to obligation to treat humanely persons whose liberty has been restricted other than under internment or detention but "in any way whatsoever for reasons related to the armed conflict").

as by the safeguards provided by Article 6 APII in case of penal prosecution of individuals.

150. The Pre-Trial Judge further considers that anyone falling in the hands of the opposing party is entitled to certain (substantive and procedural) minimum guarantees, in accordance with Common Article 3 and Articles 4-6 APII as reflected under customary international law.[297] These guarantees, which have an absolute character,[298] must be enforced by all parties to a non-international armed conflict (including armed groups)[299] and must be afforded to all persons whose liberty has been restricted, regardless of whether there is a legal basis to detain or intern them and of the reason(s) to do so.[300] On the other hand, however, the Pre-Trial Judge considers that IHL applicable to non-international armed conflict is silent on the grounds and procedures for deprivation of liberty, as opposed to the more detailed regimes of internment and detention foreseen by IHL applicable to international armed conflict, particularly in the Third and Fourth Geneva Conventions.[301]

151. In the Confirmation Decision, the Pre-Trial Judge held that deprivation of liberty without a legal basis *or* in violation of basic safeguards is not compatible with and violates the requirement of humane treatment of all persons placed *hors de combat*, including by detention, as enshrined in Common Article 3.[302] There are therefore two

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[297] Customary IHL Study, (Vol. I (Rules)), Rules 87, 100-102, pp 306-308, 352-374. *See also* Confirmation Decision, para. 34.
[298] 2020 ICRC Commentary GC III, paras 538, 542 (Common Article 3); 1987 ICRC Commentary APII, para. 4528 (Article 4), para. 4567 (Article 5), para. 4599 (Article 6).
[299] 2020 ICRC Commentary GC III, para. 542 (Common Article 3): "it is undisputed that the substantive provisions of common Article 3 bind all such armed groups when they are party to an armed conflict". *See also* 1987 ICRC Commentary APII, paras 4460, 4470 (Article 1). This commentary clarifies that the expression "those who are responsible for the internment or the detention" refers to "persons who are responsible de facto for camps, prisons, or any other places of detention, independently of any recognized legal authority", 1987 ICRC Commentary APII, para. 4582 (Article 5).
[300] 1987 ICRC Commentary APII, para. 4568 (Article 5). *See also* 2020 ICRC Commentary GC III, para. 542 (Common Article 3), paras 552, 573.
[301] Geneva Convention Relative to the Treatment of Prisoners of War, 82 UNTS 251, 12 August 1949, Article 21; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 973, Articles 41-42, 78.
[302] Confirmation Decision, para. 35.

different and autonomous situations in which deprivation of liberty may violate IHL and become arbitrary.[303] The first situation occurs when a party to a non-international armed conflict deprives someone of his or her liberty without a valid legal basis. The second situation occurs once a person is already in the hands of the detaining party and is not afforded the basic guarantees to which he or she is entitled under IHL. In the latter scenario, irrespective of whether or not IHL contains an inherent power or basis to detain in non-international armed conflict "additional authority related to the grounds and procedure for deprivation of liberty […] must in all cases be provided", as these are otherwise not explicitly regulated under IHL applicable to non-international armed conflict.[304]

152. With regard to the first situation, the Pre-Trial Judge considers that, at the time of the alleged commission of the crimes set forth in the Indictment, neither conventional IHL nor customary IHL provided a legal basis for deprivation of liberty in non-international armed conflict (whether in the form of detention or internment).[305] Accordingly, *any* form of deprivation of liberty in non-international armed conflict was arbitrary under IHL. The absence of a legal basis for detention under IHL, however, does not affect the authority of a State engaged in a non-international armed conflict to rely on its domestic law as a legal basis for detention. That being said, the principle of equality of belligerents cannot be stretched so as to provide an equal authority to the armed group to deprive persons of their liberty, as the equality of belligerents in these types of armed conflict (particularly in matters

[303] Customary IHL Study (Vol. I (Rules)), Rule 99 (pp 347-349). The deprivation of liberty in international armed conflict is premised on exactly the same logic. *See* ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgement, 17 December 2004, para. 73; *Prosecutor v. Delalić et al*. ("Delalić et al. Appeals Judgment"), IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001, para. 322.
[304] 2020 ICRC Commentary GCIII, para. 765 (Common Article 3).
[305] *See similarly* United Kingdom, Supreme Court, *Abd Ali Hameed Waheed and Serdar Mohamed v. Ministry of Defence*, [2017] UKSC 2, Judgment, 17 January 2017, paras 12, 234-276.

such as deprivation of liberty), will necessarily and inherently be asymmetrical towards the State.

153. With regard to the second situation, the Pre-Trial Judge recalls the principle of humanity, a key feature of Common Article 3 and one of the five fundamental principles of IHL.[306] The principle of humanity requires that persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. For the purpose of interpreting this fundamental principle, the Pre-Trial Judge notes that the same requirement is also enshrined in Article 4(1) APII, according to which all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, shall in all circumstances be treated humanely. Critically, the requirement of humane treatment crystallised into a rule of customary IHL, equally applicable to international and non-international armed conflict (Rule 87 Customary IHL Study).[307]

154. As previously held,[308] the requirement of humane treatment has a much broader scope than the prohibitions expressly listed in Common Article 3,[309] which are simply illustrative of conduct that is indisputably in violation of the provision.[310] In this respect, the Pre-Trial Judge considers that, notwithstanding the absence of a legal basis for detention under IHL, when armed groups, in the exercise of their territorial control, deliberately choose to deprive individuals of their liberty, IHL nevertheless prescribes that they shall enforce, where practically feasible, basic procedural

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[306] Together with the principles of military necessity, distinction, proportionality, and unnecessary suffering.
[307] *See* Customary IHL Study, (Vol. I (Rules)), Rule 87 (p. 306). *See also* Nicaragua Case, para. 218.
[308] Confirmation Decision, para. 34.
[309] Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.
[310] 2020 ICRC Commentary GCIII, paras 588-589 (Common Article 3); ICTY, *Prosecutor v. Aleksovski* ("Aleksovski Trial Judgment"), IT-95-14/1-T, Trial Chamber, Judgement, 25 June 1999, para. 49.

guarantees in respect of persons in their hands, whether interned or detained.[311] These obligations originate from the requirement of humane treatment of persons whose liberty has been restricted and they increase when armed groups, as was the case of the KLA, pledged to apply IHL,[312] exercised a solid territorial control,[313] and had (access to) a justice system, however rudimentary.[314] These basic guarantees include: (i) the obligation to inform a person who is arrested of the reasons for arrest; (ii) the obligation to bring a person arrested on a criminal charge promptly before a judge or other competent authority; and (iii) the obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.[315]

155. It follows that arbitrary deprivation of liberty, as crystallised in Rule 99 Customary IHL Study (which is equally applicable to international and non-international armed conflict),[316] is not compatible with the abovementioned requirement of humane treatment, as stipulated under Common Article 3 and Rule 87 Customary IHL Study.[317] Accordingly, the failure to provide any of the abovementioned basic guarantees to persons deprived of their liberty, will render such deprivation of liberty arbitrary, in contravention of the above legal framework.[318]

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[311] *See similarly* Pejic, J., "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", (2005) 87 *International Review of the Red Cross* 376.
[312] 075993-076009, paras 23-27; 075552-075578, paras 91-100; SPOE40000792-SPOE40000792-ET Revised; 043619-043620-ET, p. 3; U003-8586-U003-8590, p. U003-8589.
[313] Confirmation Decision, para. 132.
[314] 075552-075578, paras 91-100; SITF00016611-00016704, pp SITF00016646-00016647; 012450-TR-ET Part 1, pp 20 ff; 043864-043864-ET Revised; 025477-TR-ET Part 3 Revised, pp 28-30; 058499-TR-ET Part 6, pp 20-22.
[315] Customary IHL Study, (Vol. I (Rules)), Rule 99 (pp 349-350); Confirmation Decision, para. 95.
[316] Customary IHL Study, (Vol. I (Rules)), Rule 99 (p. 344).
[317] Customary IHL Study, (Vol. I (Rules)), Rule 99 (p. 344).
[318] For a similar interpretation of the legal framework applicable to non-international armed conflict in relation to deprivation of liberty, *see* Office of the UN High Commissioner for Human Rights on Libya, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, A/HRC/31/CRP.3, 15 February 2016, para. 128.

156. In light of the foregoing considerations, the Pre-Trial Judge finds that arbitrary deprivation of liberty in non-international armed conflict constitutes a serious violation of IHL, including of Common Article 3.

(c) Whether arbitrary detention gives rise to individual criminal responsibility

157. At the outset, the Pre-Trial Judge notes the objections raised by the Veseli Defence with regard to the reliability of the Customary IHL Study in determining the status of customary international law. The Pre-Trial Judge clarifies that the Customary IHL Study is not an *expression* of customary international law, and that the ICRC does not, in itself, generate or crystallise State practice, for the self-evident reason that the ICRC is neither a State nor a court of law. However, the Pre-Trial Judge considers that, together with other actors, domestic and international, the ICRC (and its Customary IHL Study) is an authoritative reference for State practice, which the Pre-Trial Judge is entitled to independently review in order to determine whether sufficient practice and *opinio juris* exist in support of any given custom, at any given time.[319] The Pre-Trial Judge notes that the positions held by the ICRC, whether in the Customary IHL Study or the commentaries to the Geneva Conventions and their Additional Protocols, have previously been relied upon by other courts and tribunals, as a guidance in reaching their decisions.[320]

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[319] *See similarly* International Law Commission, *Draft Conclusions on Identification of Customary International Law* ("ILC Draft Conclusions"), A/73/10, 10 August 2018, p. 132, para. 9 of commentary to Conclusion 4.

[320] *See for example* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Public Redacted Version of Judgement issued on 24 March 2016, 24 March 2016, para. 5949; *Prosecutor v. Karadžić*, IT-95-5/18-AR72.5, Appeals Chamber, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, paras 24-25; *Prosecutor v. Galić*, IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para. 138; *Prosecutor v. Stakić* ("Stakić Appeal Judgment"),, IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006, paras 296-297; *Prosecutor v. Halilović*, IT-01-48-T, Trial Chamber I, Section A, Judgement, 16 November 2005, para. 38 (footnote 88); *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000, para. 22; *Prosecutor v. Mučić et al.*, IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 208; ECCC, *Prosecutor v. Kaing* ("Duch Trial Judgment"), 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 441; SCSL, *Prosecutor v. Fofana et al.*, SCSL-04-14, Trial Chamber I, Decision on motions for judgment of

158. The Pre-Trial Judge also considers that reliance on practice post-dating the timeframe relevant to the Indictment can be acceptable in some cases, only as a subsidiary means, to demonstrate the continuing development of (as opposed to contrary practice to) an already existing customary rule at the relevant time. In particular, subsequent State practice may be, in certain circumstances, a useful indication of the lack of practice opposing the formation of a custom (inaction) and/or of the intent of States to actually follow an already existing customary rule, insofar as States were in a position to react to such custom, if they wanted to. Accordingly, reference to the few pieces of practice that post-date the timeframe relevant to the Indictment is made in accordance with these strict requirements.[321]

159. Regarding the existence of a customary rule criminalising arbitrary detention in non-international armed conflict at the time of the alleged commission of the crimes, the Pre-Trial Judge observes that the ICRC commentary to Rule 99 Customary IHL Study points to a number of States that have criminalised arbitrary deprivation of liberty, also in non-international armed conflict.[322]

160. Notably, Article 142 SFRY Criminal Code criminalised illegal arrests and detention, without differentiating between or restricting its scope of application to international or non-international armed conflict, but rather using a tripartite formulation to define its scope: war, armed conflict and occupation, which can well include situations of non-international armed conflict. The Pre-Trial Judge further considers that essentially the same text as Article 142 SFRY Criminal Code is reproduced in the corresponding war crime provisions of other criminal codes of

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acquittal pursuant to Rule 98, 21 October 2005, para. 111; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Appeals Chamber, Judgment, 28 May 2008, paras 396, 398.

[321] *See similarly* ILC Draft Conclusions, conclusion 6(1) and its commentary. *See also* ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, I.C.J. Reports 2009 (p. 213), Judgment, 13 July 2009, para. 141 ("[…] the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant [in determining a customary rule]").

[322] Customary IHL Study, (Vol. II (Practice)), pp 2331-2337 (Rule 99).

former Yugoslavia: the 1994 Penal Code of Slovenia;[323] the 1996 Criminal Code of the Republic of Macedonia;[324] the 1997 Criminal Code of Croatia;[325] the 1998 Criminal Code of the Federation of Bosnia and Herzegovina;[326] and the 2000 Criminal Code of the Republika Srpska.[327] All these pieces of criminal legislation included arbitrary detention as a war crime, without differentiating between international and non-international armed conflict, contrary to other criminal codes elsewhere, in which the legislators, when criminalising the very same conduct, explicitly referred to the grave breaches of the Geneva Conventions, thus expressly limiting the scope of application to international armed conflict only.[328]

161. Outside of the former Yugoslavia, other criminal codes also did not differentiate between the applicability of war crimes (including arbitrary detention) to international and non-international armed conflict,[329] and some of them actually used the same wording as the criminal codes of the countries of the former Yugoslavia.[330] The Pre-Trial Judge observes that certain legislative instruments state that such conduct is a war crime in international and non-international armed conflict,[331] and

[323] Slovenia, Penal Code (Kazenski zakonik Republike Slovenije), 1994, Article 374(1).
[324] Republic of North Macedonia, Criminal Code (Кривичен законик на Република Северна Македонија), 1996, Article 404(1).
[325] Croatia, Criminal Code (Kazneni zakon Republike Hrvatske), 1997, Article 158(1).
[326] Federation of Bosnia and Herzegovina, Criminal Code, (Krivični zakon Federacije Bosne i Hercegovine), 1998, Article 154(1).
[327] Republika Srpska, Criminal Code (Krivični zakon Republike Srpske), 2000, Article 433(1).
[328] *See for example* India, Geneva Conventions Act, 1960, Section 3(1); Cyprus, Geneva Conventions Act, 1966, Section 4(1); Botswana, Geneva Conventions Act, 1970, Section 3(1); Barbados, Geneva Conventions Act, 1980, Section 3(2); Canada, Geneva Conventions Act, 1985, Section 3(1); Luxembourg Law on the Punishment of Grave Breaches, 1985, Article 1(7).
[329] *See for example* Romania, Penal Code (Codul penal al României), 1968, Article 358(d); Democratic Republic of the Congo, Code of Military Justice (Code de justice militaire), 1972, Article 527; Armenia, Penal Code (ՀԱՅԱՍՏԱՆԻ ՀԱՆՐԱՊԵՏՈՒԹՅԱՆ ՔՐԵԱԿԱՆ ՕՐԵՆՍԳԻՐՔ / УГОЛОВНЫЙ КОДЕКС РЕСПУБЛИКИ АРМЕНИЯ), 2003, Article 390.2(4).
[330] *See for example* Ethiopia, Penal Code, 1957, Article 282(c); Paraguay, Penal Code (Código Penal de Paraguay), 1997, Article 320(5); Poland, Penal Code (Kodeks karny), 1997, Article 124; Portugal, Penal Code (Código penal), 1996, Article 241(1)(g).
[331] *See for example* Burundi, Law on Genocide, Crimes Against Humanity and War Crimes (Loi N° 1/004 du 8 mai 2003 portant répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre), 2001, Article 4(a)(d), (g); Switzerland, Penal Code (Code pénal Suisse / Codice penale svizzero/Strafgesetzbuch/Cudesch penal svizzer), 1937, Article 264(c)(2); the Netherlands, Wartime

some laws pushed even further by criminalising grave breaches also in non-international armed conflict, thereby making the universal jurisdiction regime applicable.[332]

162. In addition to relevant national legislation as evidence of State practice (as well as of *opinio juris*), the Pre-Trial Judge recalls that the practice of international organisations, in the form of statements and resolutions, may support the existence of a rule of customary international law.[333] In this regard, the Pre-Trial Judge notes that the UN Security Council had twice expressed concern with regard to the grave violations of IHL in Bosnia-Herzegovina, Croatia and the SFRY during the 1990s, including by referring explicitly to the consistent pattern of unlawful or arbitrary detention by all parties to the conflict.[334] The UN General Assembly and the UN Commission on Human Rights echoed the UN Security Council's concerns, including with reference to arbitrary or unlawful detention.[335] In another resolution dated April 1996 and concerning the non-international armed conflict in Sudan, the UN Commission on Human Rights called upon all parties to the hostilities[336] to respect fully Common Article 3 and the two Additional Protocols of 1977 and "to protect all

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Criminal Law Act (Wet oorlogsstrafrecht), 1952, Article 5(1) in combination with Article 1(3); Niger, Penal Code (Code Pénal du Niger), 1961, Article 208.3(6); Georgia, Criminal Code (საქართველოს სისხლის სამართლის კოდექსი), 1999, Article 411(2)(f); Nicaragua, Penal Code (Proyecto de Ley No. 641, Código Penal), 1999, Article 461.

[332] *See for example* Belgium, Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (Loi relative à la répression des violations graves de droit international humanitaire), 1993, Article 1(1)(6); Moldova, Penal Code (Codul penal al Republicii Moldova), 2002, Article 391.

[333] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971 (p. 16), Advisory Opinion, 21 June 1971, para. 22.

[334] UN Security Council, *Resolution 1019 (1995)*, S/RES/1019, 9 November 1995; *Resolution 1034 (1995)*, S/RES/1034, 21 December 1995.

[335] UN General Assembly, *Resolution 50/193 (1996)*, A/RES/50/193, 11 March 1996; UN Commission on Human Rights, *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, E/CN.4/RES/1996/71, 23 April 1996.

[336] The Government of the Sudan, the South Sudan Independence Movement and the Sudan People's Liberation Movement-Bahr al Ghazal Group, para. 14 of the Resolution.

civilians […] from violations of human rights and humanitarian law, including […] arbitrary detention".[337]

163. Lastly, in their Final Declaration of 2002, the delegations of the first Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, expressed concerns about the "number and expansion of conflicts in Africa and […] the spread of […] arbitrary detention".[338]

164. By the very nature of the above State practice, comprising national legislation and expressions of sovereign positions through international organisations, the Pre-Trial Judge is also satisfied that the required acceptance of that practice as law (*opinio juris*) existed on the consolidation of a customary rule related to arbitrary detention in non-international armed conflict at the relevant time.

165. The Pre-Trial Judge further recalls his findings that, at the time of the alleged commission of the crimes charged, all Accused held high-ranking positions within the KLA, with a vast set of responsibilities and powers that allowed them to access a variety of public information and knowledge and that, accordingly, customary international law was accessible and foreseeable to them.[339] For the same reasons, and considering in particular the criminalisation of arbitrary deprivation of liberty at the regional level of the countries of the former Yugoslavia (and beyond), as well as the condemnation of such conduct by the UN, the Pre-Trial Judge finds that it was accessible and foreseeable to the Accused, at the relevant time, that involvement in acts of arbitrary deprivation of liberty might give rise to individual criminal responsibility.

[337] UN Commission on Human Rights, *Situation of Human Rights in the Sudan*, E/CN.4/RES/1996/73, 23 April 1996, para. 15.
[338] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, *Final Declaration*, Niamey, 18-20 February 2002, preamble.
[339] *See* paras 103-104 above.

166. In light of the foregoing State practice and the *opinio juris*[340] resulting from the combination of national (criminal) legislation and practice from States acting in and through international organisations, the Pre-Trial Judge finds that, during the time relevant to the charges set forth in the Indictment, a customary rule existed, which criminalised arbitrary detention as a war crime in non-international armed conflict. The status of the law, at the national, regional, and international level, was sufficiently accessible, clear and foreseeable for the Accused to anticipate the penal consequences of any such actions.

2. Enforced Disappearance of Persons as a Crime against Humanity

167. At the outset, the Pre-Trial Judge recalls his findings that the SC shall apply customary international law when adjudicating crimes under Articles 13 and 14 of the Law, allegedly committed during its temporal jurisdiction.[341] The Pre-Trial Judge also recalls that enforced disappearance of persons as a crime against humanity is explicitly included in Article 13 of the Law, in which the Kosovar legislator has sought to reflect crimes against humanity considered to be such under customary international law during the SC's temporal jurisdiction, as indicated by the chapeau of that provision.

168. The explicit inclusion of enforced disappearance of persons in Article 13 of the Law does not, however, prejudice the Defence from challenging the customary status of this crime in 1998-1999, consistent with the obligation of the SC to verify that each crime charged fulfils the principle of legality against the backdrop of customary international law. In the view of the Pre-Trial Judge, State practice shows a consistent trend, regionally and universally, towards the customary proscription of enforced

[340] *See for example* ICJ, Asylum Case, pp 14-15; Fisheries Case, p. 131; North Sea Continental Shelf Case, para. 77; Continental Shelf Case, para. 27; Nicaragua Case, para. 183; Jurisdictional Immunities Case, para. 55.
[341] *See* para. 102 above.

disappearance of persons, as a separate crime against humanity, by 1998 at the latest. The Defence argument that only two instruments existed before 1998, notably the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance and the 1994 Inter-American Convention on Forced Disappearance of Persons ("Inter-American Convention"), which are purportedly not enough to back the existence of a customary rule, is not persuasive. The Pre-Trial Judge considers that the selective approach by the Defence fails to recognise the manifestation of State practice and *opinio juris* over decades, and how such practice mutually reinforces each other in determining the existence of a customary rule at the time of the alleged crimes.

169. The Pre-Trial Judge notes that a number of States criminalised enforced disappearance of persons in their domestic (military and civilian) legislation already at the time relevant to the Indictment.[342] States have also taken position (much) earlier than 1998 on the proscription of enforced disappearance of persons both at the regional level,[343] and universally through UN official reports and resolutions.[344] This

[342] Colombia, Basic Military Manual (Básico para las Personerías y las Fuerzas Armadas de Colombia), 1995, p. 30; Commander of the Regional Military Command of Irian Jaya and Maluku, Directive Concerning Human Rights, 1995, para. 8; Peru, Human Rights Charter of the Security Forces (Derechos Humanos: El Decálogo de las Fuerzas del Orden), 1991, p. 19; Azerbaijan, Criminal Code (Azərbaycan Respublikasının Cinayət Məcəlləsi), 1999, Article 110; Belarus, Criminal Code (Уголовный кодекс Республики Беларусь), 1999, Article 128; Belgium, Penal Code (Strafwetboek / Code Pénal), 1867 (as amended in 2003), Article 136 *ter*; Belgium, Law Relating to the Repression of Grave Breaches of International Humanitarian Law (Loi relative à la répression des violations graves de droit international humanitaire), 1993 (as amended in 2003) Article 1 *bis*; Congo, Genocide, War crimes and Crimes Against Humanity Act (Loi No. 8-98 du 31 octobre 1998 portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité), 1998, Article 6; Croatia, Criminal Code (Kazneni zakon Republike Hrvatske), 1997, Article 157(a); Denmark, Military Criminal Code (Militær straffelov), 1973 (as amended in 1978), Section 25(1); El Salvador, Penal Code (Código Penal), 1997, Article 364; France, Penal Code (Code Pénal), 1992, Article 212(1); Niger, Penal Code (Code Pénal du Niger), 1961 (as amended in 2003), Article 208(2); Paraguay, Penal Code (Código Penal de Paraguay), 1997, Article 236; Senegal, Penal Code (Code Pénal), 1965 (as amended in 2007), Article 431-2(6); Switzerland, Military Criminal Code, 1927 (as amended up to 2011), Articles 5(1)(1)(d), (5) and 109(1)(e).

[343] Organisation of American States, *Resolution AG/RES. 666 (XIII-O/83)*, 18 November 1983, p. 69; Parliamentary Assembly of the Council of Europe, *Resolution 828*, 1984, para. 12.

[344] UN General Assembly, *Resolution 33/173 ("Disappeared Persons")*, A/RES/33/173, 20 December 1978; UN Economic and Social Council, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 36th Session*, E/CN.4/1986/5, EC/CN.4/Sub.2/1985/57, 4 November 1985; UN Economic and Social Council; *Report of the Sub-Commission on Prevention of Discrimination and Protection*

early process has evolved in the simultaneous codification of enforced disappearance of persons at the regional level, through the Inter-American Convention,[345] and at the universal level by the International Law Commission.[346] With respect to the latter, the Defence contention that the International Law Commission had not included enforced disappearance of persons in its 1991 Draft Code of Crimes against the Peace and Security of Mankind is irrelevant, as such conduct was included in the 1996 version,[347] consistent with the formation, by 1998, of a customary rule on the matter. Notwithstanding this already clear trend, these codification efforts developed further into the adoption of the ICC Statute on 1 July 1998 by a majority of 120 States. The criminalisation in the ICC Statute of enforced disappearance of persons is accordingly relevant albeit not a determinative indicator of the customary nature of this crime.[348] The Defence argument that there was considerable debate during the negotiations among delegations as to enforced disappearance of persons as a crime against humanity[349] equally fails insofar as such a crime against humanity was ultimately included in the ICC Statute.

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of Minorities on its 36th Session, E/CN.4/1984/3, E/CN.4/Sub.2/1983/43, 20 October 1983, para. 283; UN General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearance*, A/RES/47/133, 18 December 1992, p. 1.

[345] Inter-American Convention, AG/RES. 1256 (XXIV-O/94), 6 September 1994, preamble, Article 1(b).

[346] International Law Commission, *Yearbook of the International Law Commission 1991, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-third session*, A/46/10, 19 July 1991, p. 104; International Law Commission, *Yearbook of the International Law Commission 1996, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-eighth session*, A/51/10, 26 July 1996, pp 47, 50.

[347] International Law Commission, *Yearbook of the International Law Commission 1996, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its forty-eighth session*, A/51/10, 26 July 1996, pp 47, 50.

[348] ICC Statute, Article 7(1)(i).

[349] From the preparatory works, it appears that only the Indian and Russian delegations objected to the inclusion of enforced disappearance persons in the ICC Statute, whereas other delegations simply advocated for a more detailed definition of the crime, without opposing it as such (*see*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998 Official Records, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.183/13 (Vol.11).

170. In addition, the Pre-Trial Judge considers it of relevance that two tribunals with jurisdiction[350] over enforced disappearance as a crime against humanity, notably the Extraordinary African Chambers ("EAC") and the Special Panels for Serious Crimes ("SPSC") within the District Court of Dili, prosecuted persons for such crimes, related to facts that occurred, respectively, between 1982-1990 and April 1999.[351] The customary status of enforced disappearance of persons as a discrete crime against humanity by 1998 is further supported by the findings of the Supreme Court of the ECCC, which held that such crystallisation occurred by the time this conduct was included as a separate category of crimes against humanity in the ICC Statute.[352] The Pre-Trial Judge also observes that the State Court of Bosnia-Herzegovina reached the conclusion that enforced disappearance of persons had become a customary crime in relation to facts that occurred in 1992.[353]

171. In addition to the general and consistent practice analysed above, the Pre-Trial Judge recalls that he may also take into consideration subsequent practice, exclusively as a subsidiary means that attests to the consolidation of the customary rule existing at the relevant time.[354] The Pre-Trial Judge observes, in this respect, that the process of criminalisation of enforced disappearance of persons continued as a result of the adoption of the ICC Statute,[355] thus evidencing the continuing acceptance of the

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[350] UN Transitional Administration in East Timor, *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15, 6 June 2000, Section 5.1(i); EAC Statute, Articles 3 and 11, 52 ILM (2013), pp 1020–1036, Article 6(f).
[351] SPSC, *Maubere*, 23/2003, Indictment, 11 September 2003, p. 7; EAC, *Habré*, Judgment, 30 May 2016, paras 1457-1466.
[352] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgement ("Case 002 Appeal Judgment"), 23 November 2016, para. 589.
[353] Bosnia-Herzegovina *Boban Šimšić*, State Court, Panel of the Appellate Division, Verdict, X-KRŽ-05/04, 7 August 2007, p. 47.
[354] *See* para. 158 above.
[355] *See for example* Germany, Code of Crimes against International Law, Section 7(1); Belgium, Criminal Code, Article 136*ter*; France, Criminal Code, Article 212-1; Bosnia and Herzegovina, Criminal Code, Article 172(1)(i); Australia, ICC Consequential Amendments Act, 2002, Section 268.21; Canada, Crimes Against Humanity and War Crimes Act, 2000, Section 4(1), (4); New Zealand, International Crimes and ICC Act, 2000, Section 10(2). *See also further references in* Hall, C., van den Herik, L., "Article 7", in Triffterer, O. and Ambos K. (eds), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Hart, Nomos 2016 (third edition), p. 231, footnote 525.

binding proscription of the crime, and giving effect to its settled foundation in customary international law.

172. By the very nature of the above State practice, comprising national legislation and international codifications, backed by case law and expressions of sovereign positions through international organisations, the Pre-Trial Judge is also satisfied that the required acceptance of that practice as law (*opinio juris*) existed on the consolidation of a customary rule related to enforced disappearance of persons by 1998.

173. Regarding the accessibility and foreseeability requirements, the Pre-Trial Judge recalls his findings that, at the time of the alleged commission of the crimes charged, all Accused held high-ranking positions within the KLA, with a vast set of responsibilities and powers that allowed them to access various sources of public information and knowledge and that, accordingly, customary international law was accessible and foreseeable to them.[356] The Pre-Trial Judge further considers that the pattern of enforced disappearance of persons during the armed conflicts in the former Yugoslavia was repeatedly condemned by the UN Security Council and the UN General Assembly,[357] thus providing further accessibility to the Accused with regard to the consequences of engaging in such conduct. For these reasons, the Pre-Trial Judge finds that it was accessible and foreseeable to the Accused, at the relevant time, that involvement in acts of enforced disappearances might give rise to individual criminal responsibility.

174. In light of the foregoing, the Pre-Trial Judge finds that, during the temporal framework of the charges as set forth in the Indictment, a customary rule existed, which criminalises enforced disappearances of persons as a crime against humanity.

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[356] *See* paras 103-104 above.

[357] UN Security Council, *Resolution 1034 (1995)*, S/RES/1034, 21 December 1995, pp 1-2; UN Commission on Human Rights, *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, E/CN.4/RES/1996/71, 23 April 1996, pp 4-5; UN General Assembly, *Resolution 50/193 (1996)*, A/RES/50/193, 11 March 1996, paras 2, 4.

The status of the law, at the national and international level, was sufficiently accessible, clear and foreseeable for the Accused to anticipate that committing such crime might give rise to individual criminal responsibility.

175. Lastly, with regard to the Defence arguments concerning the required intent to prove the crime of enforced disappearance of persons, the Pre-Trial Judge finds that these arguments touch upon the constitutive elements of this crime. These issues are not jurisdictional in nature, as they do not pertain to the question whether enforced disappearance can be applied before the SC. Rather, they concern the definition of the crime, which may be discussed at trial. Accordingly, the Defence arguments in this respect must be dismissed.

D. THE MODES OF LIABILITY

1. Joint Criminal Enterprise

(a) Article 16(1)(a) of the Law and the applicability of Kosovo law

176. The Defence contends that (i) the exclusion of JCE from the text of Article 16(1)(a) of the Law appears to be a deliberate choice to reject it as a form of liability before the SC;[358] and (ii) given that none of the relevant provisions of the SFRY Criminal Code provide for a mode of liability akin to JCE and in light of the 2020 Serbian CC Judgment, the term "commission" must be applied according to Kosovo law.[359]

177. As regards the Defence argument regarding the absence of JCE from the text of Article 16(1)(a) of the Law, the Pre-Trial Judge observes that this provision lists planning, instigating, ordering, committing and aiding and abetting as the modes of liability applicable for crimes under Article 13-14 of the Law. Unlike paragraphs (2) and (3) of the same provision, which refer to Kosovo criminal law, paragraph (1) does

[358] Selimi Jurisdiction Motion (JCE), paras 22, 26-27; Thaçi Jurisdiction Motion, para. 61; Krasniqi Jurisdiction Motion, paras 17-18, 21; Veseli Jurisdiction Motion, para. 95.
[359] Selimi JCE Reply, paras 24-32; Thaçi Jurisdiction Motion, para. 62; Veseli JCE Reply, para. 5g.

not contain references to any applicable law. Accordingly, Article 16(1) of the Law provides for a self-contained, autonomous regime for modes of liability to be applied for crimes under Articles 13-14 of the Law. This autonomous regime must, however, be interpreted in accordance with and in the context of the SC legal framework. In this regard, the Pre-Trial Judge makes the following observations. First, as found above, by virtue of Articles 3(2)(c)-(d), (4) and 12 of the Law, the SC applies customary international law as its principal source and Kosovo substantive criminal law, where the latter is specifically incorporated in the Law and insofar as it is in compliance with customary international law.[360] Second, Articles 13-14 of the Law specifically refer to customary international law as the applicable law for crimes against humanity and war crimes during the SC temporal jurisdiction. Third, the terminology employed in Article 16(1)(a) of the Law is virtually identical to provisions regulating modes of liability in the statutes of the ICTY and ICTR, both of which applied modes of liability from customary international law.[361] The Pre-Trial Judge accordingly finds that Article 16(1) of the Law, including the understanding given to "commission", must be interpreted in accordance with customary international law as applicable at the time the alleged crimes were committed. The question whether JCE was a form of commission under customary international law at the relevant time is addressed below.[362]

178. As regards the Defence argument regarding the application of domestic modes of liability, the Pre-Trial Judge notes that Article 16(1) of the Law, in contrast with its paragraphs (2) and (3), does not expressly incorporate provisions of Kosovo law.[363] Moreover, the modes of liability applied in Kosovo substantive criminal law at the time the alleged crimes were committed, while individually comparable to those in

[360] *See* paras 99, 102 above.
[361] *See* ICTY Statute, Article 7(1); ICTR Statute, Article 6(1). *See also* SCSL Statute, Article 6(1); IRMCT Statute, Article 1(1).
[362] *See* paras 180-190 below.
[363] *See* paras 99, 102 above.

Article 16(1)(a) of the Law, provide for a structurally different system of liability.[364] Furthermore, as regards the Defence arguments on the applicability of the 2020 Serbian CC Judgment, the Pre-Trial Judge refers to his findings in paragraph 100. The Pre-Trial Judge accordingly finds that provisions of Kosovo criminal substantive law regulating modes of liability are not applicable in the interpretation of the autonomous regime of Article 16(1) of the Law.

179. In light of the foregoing, the Pre-Trial Judge finds that, in relation to crimes under Articles 13-14 of the Law, the SC may only apply modes of liability that were part of customary international law at the time the alleged crimes were committed.

(b) JCE and customary international law

180. The Defence challenges the customary nature of JCE, both in its basic ("JCE I") and in its extended forms ("JCE III"),[365] and submits that it should not be applied by the SC as a form of commission under Article 16(1) of the Law.[366] The Defence contends that: (i) the Nuremberg Charter and CCL10 were adopted after the crimes were committed and do not support JCE I and III;[367] (ii) the post-World War II case-

[364] SFRY Criminal Code, Articles 11-32 (in Chapter Two – Criminal Conduct and Criminal Liability).
[365] The Pre-Trial Judge recalls that JCE is mode of liability that encompasses three forms or categories (basic, systemic, and extended). In the basic form ("JCE I"), several perpetrators act on the basis of a common purpose; in the systemic form ("JCE II"), a variant of the first form, the crimes are committed within an organised system of ill-treatment, by members of military or administrative units, such as in concentration or detention camps; in the extended form ("JCE III"), criminal responsibility is established for acts of a co-perpetrator that go beyond the common plan but which were a foreseeable consequence of the realisation of the plan. *See* Confirmation Decision, para. 105.
[366] For JCE I: Selimi Jurisdiction Motion (JCE), paras 36-43, 44-55; Thaçi Jurisdiction Motion, para. 63; Krasniqi Jurisdiction Motion, para. 24. For JCE III: Selimi Jurisdiction Motion (JCE), paras 56-68; Thaçi Jurisdiction Motion, paras 67-71; Krasniqi Jurisdiction Motion, paras 24-49; Veseli Jurisdiction Motion, paras 98-105, 115-119.
[367] Selimi Jurisdiction Motion (JCE), para. 52; Selimi Jurisdiction Motion (JCE), paras 49-52; Krasniqi JCE Reply, para. 14.

law cited does not support JCE I,[368] nor JCE III,[369] and coupled with post-SC jurisdiction case-law it is insufficient to determine customary international law;[370] (iii) given the current controversy between JCE and co-perpetration provided in the ICC Statute as competing forms of liability, the former cannot have acquired customary nature;[371] (iv) (former) Judges of international tribunals, academic literature and recent domestic case-law have cast serious doubt on the customary nature of JCE III;[372] and (v) JCE III is not supported by international treaties and does not amount to a general principle of law.[373]

181. The Pre-Trial Judge recalls at the outset that the customary nature of JCE has been thoroughly reviewed and repeatedly confirmed by all contemporary international tribunals applying JCE,[374] except for the ECCC in relation to JCE III.[375] In light of Article 3(3) of the Law, the Pre-Trial Judge may take in consideration this consistent jurisprudence and shall address the above questions only to the extent of ascertaining whether the Defence has presented persuasive reasons warranting different legal findings on the matter at hand.

182. Before addressing the above questions, the Pre-Trial Judge makes the following observations in relation to the identification of customary international law. First, customary international law has two constituent elements: a general practice and its acceptance as law (*opinio juris*).[376] When it comes to ascertaining whether practice is

[368] Selimi Jurisdiction Motion (JCE), paras 36-55; Krasniqi Jurisdiction Motion, para. 24; Selimi JCE Reply, paras 53-59.
[369] Selimi Jurisdiction Motion (JCE), paras 58-62, 64-67; Thaçi Jurisdiction Motion, para. 68; Krasniqi Jurisdiction Motion, paras 24, 28, 31, 33, 34, 36-37; Veseli Jurisdiction Motion, paras 100-101; Krasniqi JCE Reply, para. 18; Thaçi JCE Reply, para. 18.
[370] Selimi JCE Reply, paras 60-67.
[371] Thaçi Jurisdiction Motion, paras 63-66; Thaçi JCE Reply, paras 24-25.
[372] Thaçi Jurisdiction Motion, paras 69-70; Krasniqi Jurisdiction Motion, para. 25; Veseli JCE Reply, paras 39-40;
[373] Krasniqi Jurisdiction Motion, paras 39-48; Veseli Jurisdiction Motion, para. 102.
[374] *See* footnotes 392-397, 400-404 below.
[375] *See* footnote 406 below.
[376] ILC Draft Conclusions, conclusion 2; ICJ, Nicaragua Case, paras 183, 186; North Sea Continental Shelf Case, paras 74, 77.

general, the frequency with which circumstances calling for action arise and the practice of the most affected States must also be taken into account.[377] To be accepted as law, relevant practice must be undertaken with a sense of legal right or obligation;[378] this requires broad and representative acceptance, together with no or little objection.[379] Evidence of State practice may take a wide range of forms,[380] including decisions of international and national courts.[381] Second, the two constituent elements must be ascertained taking into consideration the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.[382] Taking in consideration the overall context means that the subject-matter that the alleged rule regulates and any underlying principles of international law that may be applicable to that matter ought to be given due regard.[383]

183. As regards the Defence argument that the Nuremberg Charter and CCL10 were adopted after the crimes were committed and do not support JCE I and III, the Pre-Trial Judge notes at the outset that while neither instrument purports to embody an exhaustive codification of customary international law, they both reflect pre-existing law. In particular, seminal documents leading to the adoption of the Nuremberg Charter and CCL10 clearly state that the law applied was contemporaneous to the crimes.[384] Moreover, both instruments clearly provide for criminal liability for

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[377] ILC Draft Conclusions, commentaries (3)-(4) to conclusion 8.
[378] ILC Draft Conclusions, commentary (2) to conclusion 9; ICJ, North Sea Continental Shelf Case, para. 77; Asylum Case, p. 276.
[379] ILC Draft Conclusions, commentary (5) to conclusion 9; ICJ, Nicaragua Case, para. 186; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996 (p. 226), Advisory Opinion, 8 July 1996, para. 67.
[380] ILC Draft Conclusions, conclusion 10(1).
[381] ILC Draft Conclusions, conclusion 13; ICJ, Jurisdictional Immunities Case, para. 55; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, para. 58; PCIJ, *The Case of the S.S. "Lotus" (France v. Turkey)*, Series A, No. 10, Judgment, 7 September 1927, p. 28.
[382] ILC Draft Conclusions, conclusion 3.
[383] ILC Draft Conclusions, commentary (3) to conclusion 3.
[384] *See for example* International Conference on Military Trials: London, 1945, *American Memorandum Presented at San Francisco*, 30 April 1945, providing that "German leaders and their associates" should be charged with "joint participation in a broad criminal enterprise" and "[t]here should be invoked the rule of liability, common to most penal systems and included in the general doctrine of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes

participation in a common plan or enterprise.[385] Furthermore, several post-World War II cases confirm that the law they applied was pre-existing international law.[386] The Pre-Trial Judge accordingly finds no merit in the argument of the Defence.

184. As regards the Defence argument that the post-World War II case-law cited does not support JCE I,[387] nor JCE III,[388] and coupled with post-SC jurisdiction case-law it is insufficient to determine customary international law, the Pre-Trial Judge notes that JCE as a form of liability was systematised in the July 1999 *Tadić* appeal judgment of the ICTY, on the occasion of which the Appeals Chamber set forth its three forms.[389]

185. In relation to JCE I, the ICTY Appeals Chamber relied on the cases of *Sandrock et al*. (*"Almelo"*), *Hoelzer et al*., *Jepsen and others*, *Schonfeld and others*, *Feurstein and others (*"*Ponzano"*) and *Ohlendorf et al*. (*"Einsatzgruppen"*) to conclude that it was firmly

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are jointly liable for each of the offenses committed and jointly responsible for the acts of each other" (Part III.B). The same memorandum also referred to the "great Nazi criminal enterprise, of which the crimes and atrocities which have shocked the world were an integral part or at least the natural and probable consequence" (Part V). *See also* the Yalta Memorandum, which was a precursor to the San Francisco Memorandum and which includes similar language in Part V. International Conference on Military Trials: London, 1945, *Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General*, 22 January 1945.

[385] Nuremberg Charter, Article 6: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." *See also* Charter of the International Military Tribunal for the Far East, 19 January 1946, Article 5(c) with identical text; CCL10, Article II(2)(d): "Any person […] is deemed to have committed a crime as defined in paragraph 1 of this Article, if he […] (d) was connected with plans or enterprises involving its commission […]".

[386] *US v. Goering et al*. ("IMT Judgment"), International Military Tribunal, Judgement, 1 October 1946, in *Trial of the Major War Criminals*, Volume I, 1947, p. 444; *US v List et al. (*"Hostages"*),* Military Tribunal, Judgement, 19 February 1948, in CCL10 Military Tribunals, US Government Printing Office, Volume XI, 1951, p. 53; *Einsatzgruppen*, pp 457-458.

[387] Selimi Jurisdiction Motion (JCE), paras 36-55; Krasniqi Jurisdiction Motion, para. 24; Selimi JCE Reply, paras 53-59.

[388] Selimi Jurisdiction Motion (JCE), paras 58-62, 64-67; Thaçi Jurisdiction Motion, para. 68; Krasniqi Jurisdiction Motion, paras 24, 28, 31, 33, 34, 36-37; Veseli Jurisdiction Motion, paras 100-101; Krasniqi JCE Reply, para. 18; Thaçi JCE Reply, para. 18.

[389] Tadić Appeal Judgment, paras 195-226. JCE as a form of co-perpetration was first distinguished from other modes of liability in the December 1998 *Furundžija* trial judgment of the ICTY. *See Prosecutor v. Furundžija*, IT-95-17/1, Trial Chamber, Judgement ("Furundžija Trial Judgment"), 10 December 1998, paras 214-215, 250-257.

established in customary international law.[390] Furthermore, the ICTR Appeals Chamber in the October 2004 *Rwamakuba* decision and the ICTY Appeals Chamber in the April 2007 *Brđanin* judgment identified the cases of *Alstoetter et al. ("Justice")* and *Greifelt et al. ("RuSHA")* as additional evidence of the customary nature of JCE.[391] These

[390] Tadić Appeal Judgment, paras 196-201, referring to: *Trial of Sandrock et al. ("Almelo")*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24-26 November 1945, in *United Nations War Crimes Commission – Law Reports of Trials of War Criminals* ("UNWCC Law Reports"), Volume I; *Holzer et al.*, Canadian Military Court, 25 March – 6 April 1946, in *Record of Proceedings at Aurich, Germany*, Volume I; *Trial of Gustav Alfred Jepsen et al.*, Proceedings of a War Crimes Trial held at Luneberg, Germany 13-23 August 1946, Judgement, 24 August 1946; *Trial of Franz Schonfeld et al.*, British Military Court, Essen, 11-26 June 1946, in UNWCC Law Reports, Volume XI; *Trial of Feurstein and others ("Ponzano")*, Proceedings of a War Crimes Trial held at Hamburg, Germany, 4-24 August 1948; *US v. Ohlendorf et al.* ("*Einsatzgruppen*"), US Military Tribunal, *Proceedings and Judgment*, 8 July 1947 – 10 April 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* ("CCL10 Military Tribunals"), US Government Printing Office, Volume IV, 1951.

[391] ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4, Appeals Chamber, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* ("Rwamakuba Appeals Chamber Decision"), 22 October 2004, paras 13-31; ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007, para. 431. Both decisions referred to: *US v. Alstoetter et al. ("Justice")*, US Military Tribunal, Judgment, 3-4 December 1947, in CCL10 Military Tribunals, US Government Printing Office, Volume III, 1951; *US v. Greifelt et al. ("RuSHA")*, US Military Tribunal, Judgment, 10 March 1948, in CCL10 Military Tribunals, US Government Printing Office, Volumes IV-V, 1951. The Rwamakuba Appeals Chamber Decision (para. 23) also identified a relevant passage in the IMT Judgment. *See also* ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-A, Appeals Chamber, Judgement ("Đorđević Appeal Judgment"), 27 January 2014, paras 32-34.

findings have been repeatedly confirmed by the ICTY,[392] ICTR,[393] SCSL,[394] STL,[395] ECCC[396] and IRMCT.[397] In light of the consistent confirmation of the aforementioned post-World War II cases as evidence of the customary nature of JCE I, the Pre-Trial Judge considers that the Defence has not advanced any arguments that have not been previously considered and that would warrant a novel review of the aforementioned cases.[398] The Pre-Trial Judge accordingly finds no reason to question the validity of the

[392] ICTY, *Prosecutor v. Ojdanić et al.*, IT-99-37-AR72, Appeals Chamber, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise* ("Ojdanić Appeals Chamber Decision"), 21 May 2003, para. 30; *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber, Judgement ("Krnojelac Appeal Judgment"), 17 September 2003, para. 29; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Chamber, Judgement ("Vasiljević Appeal Judgment"), 25 February 2004, para. 95; *Prosecutor v. Babić*, IT-03-72-S, Trial Chamber I, Sentencing Judgement, 29 June 2004, paras 32-33; Stakić Appeal Judgment, paras 62, 64; *Prosecutor v. Martić*, IT-95-11-A, Appeals Chamber, Judgement ("Martić Appeal Judgment"), 8 October 2008, paras 80-81; *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, Judgement, 17 March 2009, paras 657-659; Đorđević Appeal Judgment, paras 40-45; *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, Judgement ("Popović et al. Appeal Judgment"), 30 January 2015, paras 1672-1674; *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Chamber, Judgement ("Tolimir Appeal Judgment"), 8 April 2015, paras 281-282.

[393] ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgement ("Ntakirutimana Appeal Judgment"), 13 December 2004, paras 463-465; *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Trial Chamber II, Judgement and Sentence ("Ngirabatware Trial Judgment"), 20 December 2012, para. 1299; *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Appeals Chamber, *Decision on Jurisdictional Appeals: Joint Criminal Enterprise* ("Karemera and Ngirumpatse Appeals Chamber Decision"), 12 April 2006, paras 15-16; *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Appeals Chamber, Judgement ("Karemera and Ngirumpatse Appeal Judgment") 29 September 2014, para. 110.

[394] SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Chamber II, Judgement ("Brima et al. Trial Judgment"), 20 June 2007, para. 61; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Judgement ("Fofana and Kondewa Trial Judgment"), 2 August 2007, paras 209-210; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Appeals Chamber, Judgment ("Sesay et al. Appeal Judgment"), 26 October 2009, paras 398-400; *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Chamber II, Judgement, 18 May 2012, paras 457-458.

[395] STL, STL-11-01/I, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* ("2011 Appeals Chamber Decision") 16 February 2011, para. 256. The STL Appeals Chamber listed further cases supporting JCE I (footnote 355).

[396] ECCC, *Prosecutor v. Ieng et al.*, 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, *Decision on Appeals against the Co-Investigating Judges' Order on Joint Criminal Enterprise* ("Case 002 Pre-Trial Decision"), 20 May 2010, para. 69; Duch Trial Judgment, paras 504-510; *Prosecutor v. Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Trial Chamber, Judgement, 7 August 2014, para. 691; Case 002 Appeal Judgment, paras 773-789.

[397] IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, Judgement ("Karadžić Appeal Judgment"), 20 March 2019, para. 435.

[398] The Pre-Trial Judge notes that arguments similar to those advanced by the Defence regarding JCE I have been thoroughly reviewed in ECCC, Case 002 Appeal Judgment, paras 775-789.

interpretation adopted and conclusions reached by all aforementioned international jurisdictions on the customary nature of JCE I. Instead, the Pre-Trial Judge is satisfied that the precedents listed by these jurisdictions provide a clear and sufficient basis to conclude that JCE I was part of customary international law at the time the alleged crimes were committed and remains so today.

186. In relation to JCE III, the ICTY Appeals Chamber relied on the cases of *Erich Heyer and six others* ("*Essen Lynching*"), *Kurt Goebell et al.* ("*Borkum Island*") as well as *D'Ottavio et al*. and other Italian cases to conclude that it was firmly established in customary international law.[399] These findings have been repeatedly confirmed by the ICTY,[400] ICTR,[401] SCSL,[402] STL[403] and IRMCT.[404] The ECCC departed from these findings; having reviewed several cases, including those relied upon by the SPO (i.e. *Essen Lynching, Borkum Island, Hartgen et al. (Rüsselsheim Case), Ishiyama et al., D'Ottavio et al., Ikeda* and *Tashiro et al.*),[405] the ECCC Supreme Court Chamber found insufficient evidence that JCE III was part of customary international law.[406] The Pre-Trial Judge

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[399] Tadić Appeal Judgment, paras 207-219, referring to, *inter alia*: *Trial of Erich Heyer et al. ("Essen Lynching")*, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, in UNWCC Law Reports, Volume I; *US v. Kurt Goebell et al. ("Borkum Island")*, Case No. 12-489, Review and Recommendations, 1 August 1947; *D'Ottavio et al.*, Italian Court of Cassation, Criminal Section I, Judgement no. 270 of 12 March 1947, *Journal of International Criminal Justice* 5 (2007). In paragraph 219 the Appeals Chamber notes that the same approach was adopted in other Italian cases.

[400] ICTY, Ojdanić Appeals Chamber Decision, para. 30; Krnojelac Appeal Judgment, paras 29-32; Vasiljević Appeal Judgment, paras 95, 99; Stakić Appeal Judgment, paras 100-103; Martić Appeal Judgment, paras 80-81; Đorđević Appeal Judgment, paras 48-53; Popović et al. Appeal Judgment, paras 1672-1674; Tolimir Appeal Judgment, paras 281-282.

[401] ICTR, Ntakirutimana Appeal Judgment, paras 463-465; Ngirabatware Trial Judgment, para. 1299; Karemera and Ngirumpatse Appeals Chamber Decision, paras 15-16; Karemera and Ngirumpatse Appeal Judgment, para. 110.

[402] SCSL, Brima et al. Trial Judgment, para. 61; Fofana and Kondewa Trial Judgment, paras 209-210; Sesay et al. Appeal Judgment, paras 398-400; *Taylor* Trial Judgment, paras 458, 466.

[403] STL, 2011 Appeals Chamber Decision, para. 256. The STL Appeals Chamber listed in a footnote further cases supporting JCE III (footnote 355).

[404] IRMCT, Karadžić Appeal Judgment, paras 435-437.

[405] *US v. Hartgen et al.* ("*Rüsselsheim*"), Case No. 12-1497, United States Military Commission, Review and Recommendation, 29 September 1945; *Prosecutor v. Ishiyama et al. ("Ishiyama et al.")*, Australian Military Court, 8-9 April 1946; *Queen v. Ikeda ("Ikeda")*, Case No. 72A/1947, Temporary Court Martial, Batavia, Germany, Judgement, 8 September 1948; *US v. Tashiro et al.* ("*Tashiro et al.*"), US Military Commission, Review of the Staff Judge Advocate, 7 January 1949;

[406] ECCC, Case 002 Appeal Judgment, paras 791-807.

observes that the ECCC dismissed (and the Defence challenges) these cases on the basis that no convictions based on a liability akin to JCE III had been entered,[407] the legal reasoning was absent or inconclusive,[408] the subsequent legal review carried no weight,[409] or that the cases were tried under domestic jurisdiction.[410] The Pre-Trial Judge considers that these challenges are not persuasive for the following reasons. State practice is not always entirely consistent, nor are there indications of *opinio juris* always unequivocal. There can and often are reasonable disputes as to the existence of a rule of customary international law or its content. Such disputes may stem from, *inter alia*, terminological differences[411] or the frequency and nature of the relevant practice.[412] What is important however for the identification of a customary rule is to reveal the common threads of practice that show that such a rule was applied with a sense of legal right. In the present case, the Pre-Trial Judge notes that all but one international tribunal have interpreted State practice and *opinio juris* in the same way, i.e. recognizing that JCE III forms part of customary international law. Only one jurisdiction has adopted a different interpretation. Having given due consideration to the position taken by the ECCC and related Defence arguments, the Pre-Trial Judge finds no persuasive reasons to question the validity of the interpretation adopted and conclusions reached by all aforementioned international jurisdictions on the

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[407] ECCC, Case 002 Appeal Judgment, paras 795 (*D'Ottavio et al.*), 804 (*Ishiyama et al.*); Krasniqi JCE Reply, paras 30-32 (*Ishiyama et al.*).
[408] ECCC, Case 002 Appeal Judgment, paras 791 (*Essen Lynching, Borkum Island*), 793 (*Ikeda*), 800 (*Rüsselsheim)*, 801 (*Tashiro et al.*); Selimi Jurisdiction Motion (JCE), paras 58-64 (*Essen Lynching*), 66 (*Rüsselsheim, Tashiro et al.*); Krasniqi Jurisdiction Motion, paras 30-31 (*Essen Lynching*), 32-33 (*Borkum Island*), 34 (*Ikeda*); Krasniqi JCE Reply, paras 18-19 (*Rüsselsheim)*, 25-29 (*Ikeda*), 33-34 (*Essen Lynching*), 39-40 (*Tashiro et al.*); Thaçi JCE Reply, paras 18 (*Essen Lynching*), 19 (*Ikeda, Tashiro et al.*), 20-22 (*Ishiyama et al.*); Veseli JCE Reply, para. 37, pp 16-17 (*Essen Lynching, Ishiyama et al., Ikeda, Tashiro et al.*)
[409] Selimi Jurisdiction Motion (JCE), paras 58-64 (*Borkum Island*); Krasniqi Jurisdiction Motion, para. 34 (*Rüsselsheim)*; Krasniqi JCE Reply, paras 17 (*Rüsselsheim)*, 21 (*Borkum Island*); Veseli JCE Reply, para. 37, p. 16 (*Rüsselsheim),*
[410] Krasniqi Jurisdiction Motion, paras 36-37 (*D'Ottavio et al.*); Krasniqi JCE Reply, paras 19 (*Rüsselsheim),* 36 (*D'Ottavio et al.*); Veseli JCE Reply, para. 37, p. 16 (*D'Ottavio et al.*)
[411] *Similarly* ICTR, Rwamakuba Appeals Chamber Decision, para. 24; ECCC, Case 002 Appeal Judgment, paras 775-776.
[412] *Similarly* ECCC, *Prosecutor v. Kaing Guek Eav ("Duch")*, 001/18-07-2007-ECCC/SC, Supreme Court Chamber, Appeals Judgement, 3 February 2012, para 93.

customary nature of JCE III. Instead, the Pre-Trial Judge is satisfied that the precedents listed by these jurisdictions provide a clear and sufficient basis to conclude that JCE III was part of customary international law at the time the alleged crimes were committed and remains so today.

187. As regards the Defence argument that the current controversy between JCE and co-perpetration provided in the ICC Statute shows that the former could not have acquired customary nature, the Pre-Trial Judge makes the following observations. The ICC Statute is a treaty; State parties did not seek to codify customary international law in respect of, *inter alia*, modes of liability; instead, they decided which among those should be placed within the jurisdiction of the ICC. This is reflected in Article 21 of the ICC Statute, which provides that the primary source of applicable law is the Statute, the Elements of Crimes and the Rules of Procedure and Evidence, while "principles or rules of international law" constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution.[413] As a result, the incorporation of one or the other mode of liability in the ICC Statute may be relevant, but not determinative, as to that notion's customary nature.[414] The Pre-Trial Judge considers therefore that the incorporation of co-perpetration in the ICC Statute has no bearing on the question whether JCE is a mode of liability under customary international law. The Pre-Trial Judge accordingly finds no merit in the argument of the Defence.

188. As regards the Defence argument that the statements of (former) judges of international tribunals, academic literature and recent domestic case-law have cast serious doubt on the customary nature of JCE III, the Pre-Trial Judge considers that,

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[413] *See also* ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, *Decision on the Confirmation of Charges* ("Katanga and Ngudjolo Chui Confirmation Decision"), ICC-01/04-01/07-717, 30 September 2008, para. 508.

[414] *See* ICC, *Prosecutor v Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, paras 333-338; Katanga and Ngudjolo Chui Confirmation Decision, para. 508; *Prosecutor v Katanga*, Trial Chamber II, Judgment ("Katanga Trial Judgment"), ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 1395.

in light of the above findings, such considerations are unpersuasive. In particular, publications of (former) judges and academics advocating for various developments in the law or advancing their own personal opinions on different matters cannot overturn the settled jurisprudence of international tribunals.[415] Moreover, the *Jogee* decision of the UK Supreme Court concerns a domestic offence charged under a domestic accessory liability under domestic law.[416] It has no international elements and has no bearing on the determination of customary international law in relation to international crimes. Moreover, its singularity does not allow to deduce the existence of State practice. The Pre-Trial Judge accordingly finds the Defence argument without merit.

189. As regards the Defence argument that JCE III is not supported by international treaties and does not amount to a general principle of law, the Pre-Trial Judge considers that, in light of the above findings regarding the customary nature of JCE III, such considerations no longer need to be addressed.

190. The Pre-Trial Judge accordingly finds that, during the temporal jurisdiction of the SC, JCE I and JCE III were part of customary international law and remain so today.

(c) Foreseeability and accessibility of JCE

191. The Defence contends that when interpreting foreseeability there should be no flexibility in terminology as the SPO suggests. The Defence further contends that JCE liability was not foreseeable to the Accused at the time the alleged crimes were committed, because (i) the *Tadić* appeal judgment was only issued in July 1999 and ensuing jurisprudence was inconsistent as to the notion of JCE; and (ii) the concept of

[415] ICTY, Đorđević Appeal Judgment, para. 33; ILC Draft Conclusions, commentary (3) to conclusion 14.
[416] *Similarly* IRMCT, Karadžić Appeal Judgment, paras 434-437, referring to *R v. Jogee* [2016] UKSC 8.

JCE was not known in Kosovo law, as neither Article 22 nor Article 26 of the SFRY Criminal Code reflected such a concept, especially not in its extended form.

192. Before all else, the Pre-Trial Judge shall address the SPO argument that the gravity of the crimes may refute a claim of lack of awareness of their criminality. The Pre-Trial Judge notes that the appalling nature of a charged crime may indeed play a role in determining whether the Accused knew of the criminal nature of his conduct.[417] That being said, such a consideration cannot be applied when determining whether the Accused knew that one or the other mode of liability through which the alleged crime was committed may lead to criminal responsibility. Such a broad interpretation would render any mode of liability necessarily foreseeable and accessible merely because the crime allegedly committed through it was of an atrocious or appalling nature. The Pre-Trial Judge accordingly finds the SPO argument without merit in relation to JCE.

193. As regards the Defence argument that when interpreting foreseeability there should be no flexibility in terminology, the Pre-Trial Judge notes that the principle of legality, as enshrined in Article 7(1) of the ECHR, Article 33(1) of the Constitution and Article 12 of the Law, embodies, among others, the requirement that a crime must be clearly defined in the law.[418] This requirement is satisfied when the individual can know from the wording of the relevant provision, and if need be, with the assistance of the courts' interpretation and with informed legal advice, what acts and omissions will make him or her criminally liable.[419] The concept of "law" in this regard comprises national or international law, written (statutory, jurisprudential) law or unwritten

[417] ICTY, Ojdanić Appeals Chamber Decision, para. 42.
[418] ECtHR, *S.W. v. the United Kingdom* ("S.W. v. the United Kingdom"), no. 20166/92, Judgment, 22 November 1995, para. 35; ECtHR, *Cantoni v. France* ("Cantoni v. France"), no. 17862/91, Judgment, 11 November 1996, para. 29
[419] ECtHR, S.W. v. the United Kingdom, para. 35; Cantoni v. France, para. 29; Vasiliauskas v. Lithuania [GC], para. 154.

law.[420] Customary law may be represented in unwritten law and case-law.[421] Moreover, the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.[422] Accordingly, the Pre-Trial Judge considers that, for the purposes of the present case, JCE liability, in its basic and extended form, was foreseeable to the Accused if, at the time of the alleged crimes, they could know, with the assistance of the courts' interpretation and with informed legal advice, that customary international law or Kosovo law made their intentional participation in a common plan or enterprise criminally liable, not only for the crimes forming part of such a plan, but also for crimes that were a foreseeable consequence thereof. Simply put, the Accused must have been able to appreciate that their conduct is criminal in the sense generally understood, without reference to any specific provision.[423] There is thus no requirement of identifying provisions using identical terminology when ascertaining the foreseeability of JCE liability. The Pre-Trial Judge accordingly finds the Defence argument without merit.

194. As regards the Defence argument that the *Tadić* appeal judgment was only issued in July 1999 and ensuing jurisprudence was inconsistent as to the notion of JCE, the Pre-Trial Judge recalls the above finding that JCE, in both its basic and extended forms, was part of customary international law during SC jurisdiction.[424] The Pre-Trial Judge also notes that the first ICTY judgment to take note of liability for participation in a JCE was the December 1998 *Furundžija* trial judgment.[425] In any event, given the above findings regarding the Accused's high-ranking positions within the KLA and taking

[420] Vasiliauskas v. Lithuania [GC], para. 154; S.W. v. the United Kingdom, para. 35; Cantoni v. France, para. 29.
[421] Ojdanić Appeals Chamber Decision, para. 41.
[422] ECtHR, Kononov v. Latvia [GC], para. 235; Ojdanić Appeals Chamber Decision, para. 39.
[423] ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Appeals Chamber, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 34; ECCC, Duch Trial Judgment, para. 31.
[424] *See* para. 190 above.
[425] ICTY, Furundžija Trial Judgment, paras 216, 249, 250-257.

in consideration, *inter alia*, the post-World War II general legal framework and the ongoing ICTY prosecutions at the time, the Pre-Trial Judge is satisfied that it was foreseeable to the Accused that their participation in a common plan may give rise to individual criminal responsibility.[426]

195. As regards the Defence argument that the concept of JCE was not known in Kosovo law, the Pre-Trial Judge notes that customary law is not written law; one should therefore not expect to find it crystallised into a written prohibition. It is the case, however, that domestic – and international – legal regimes sometimes provide for such a written prohibition that effectively mirrors the underlying customary law prohibition. Where it exists, such a comparable provision is relevant for evaluating whether the prohibition in question was indeed foreseeable and accessible.[427] In this regard, the Pre-Trial Judge notes that, during SC temporal jurisdiction, criminal liability in Kosovo was regulated by Articles 11-32 of the SFRY Criminal Code. Among these provisions, Articles 22 and 26 both mirror the concept of common purpose liability.

196. In particular, while set under the heading of "Complicity", Article 22 of the SFRY Criminal Code provides that

> [i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.[428]

197. This provision lays down in unequivocal terms the criminal responsibility of an individual for participating in or contributing to a common criminal act. Article 22 of the SFRY Criminal Code was found to mirror the elements of JCE I (existence for a joint plan or agreement which need not precede the crimes, no requirement for a

[426] *See* paras 103-104 above. *See also* Ojdanić Appeals Chamber Decision, para. 41.
[427] *Similarly* ECCC, Case 002 Pre-Trial Decision, para. 45.
[428] The Pre-Trial Judge notes that a provision with similar wording bears the title of "Co-perpetration" in the Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25, 6 July 2003 (Article 23), the Criminal Code of the Republic of Kosovo, Code No. 04/L-082, 20 April 2012 (Article 31) and the Criminal Code of the Republic of Kosovo, Code No. 06/L-074, 23 November 2018 (Article 31).

physical contribution as long as the person participates or contributes in some way and a shared intent) by Kosovo courts, including the Supreme Court.[429]

198. Another provision that bears resemblance to JCE I is Article 26 of the SFRY Criminal Code, which provides that

> anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.

199. This provision mirrors JCE I insofar as it lays down the criminal liability of persons participating in an organisation or association aimed at committing criminal acts. Article 26 of the SFRY Criminal Code was found to mirror JCE I by both the Supreme Court of Kosovo and the ICTY.[430]

200. Furthermore, a combined reading of Articles 11 and 13 of the SFRY Criminal Code shows that criminal liability was laid down not only for a person who "is conscious of his deed and wants its commission", but also an individual who "is conscious that a prohibited consequence might result from his act or omission and consents to its occurring". When coupled with Article 22 or 26 of the SFRY Criminal Code, these provisions mirror the elements of JCE III: participation in a common plan with shared intent and responsibility not only for the intended crimes, but also for the foreseeable consequences. This interpretation has also been confirmed by the Supreme Court of Kosovo.[431] The fact that some Kosovo courts took a different view in this

[429] Basic Court of Mitrovicë, Judgment, 12 September 2013, No. 14/2013, p. 37; Court of Appeals of Kosovo, Judgment, 11 September 2013, PAKR 966/2012, para. 74; Court of Appeals of Kosovo, Judgment, 30 January 2014, PAKR 271/2013, paras 36-39; Supreme Court of Kosovo, Judgment, 7 August 2014, PAII 3/2014, paras xIi-xIii.
[430] Supreme Court of Kosovo, Judgment, 10 April 2009, Ap.-Kz No 371/2008, pp 14-16, 63-64; ICTY, Ojdanić Appeals Chamber Decision, para. 40.
[431] Supreme Court of Kosovo, Judgment, 29 May 2012, Ap-Kz 67/2011, pp 7-9.

regard does not lend to the conclusion that a form of liability mirroring JCE III was not provided in Kosovo law.[432]

201. In light of the foregoing, the Pre-Trial Judge finds that both JCE I and JCE III were foreseeable and accessible to the Accused at the time the alleged crimes were committed.

(d) Challenges related to the application of JCE

202. The Defence raises a number of further challenges related to the application of JCE. In particular, the Defence contends that: (i) in line with the principle of *in dubio pro reo*, Article 16(1)(a) of the Law must be interpreted in favour of the Accused and should not be extensively construed to his detriment by introducing JCE liability; (ii) in line with the principle of *lex mitior*, even if the Pre-Trial Judge finds that JCE III existed in customary international law during the Indictment period, he must take into consideration the evolving state of the law that produces a result substantively more favourable to the Accused; (iii) JCE III is a mode of liability that endangers the principle of culpability by introducing a form of collective liability or guilt by association; and (iv) JCE III does not attach to special intent crimes.

203. The Pre-Trial Judge notes at the outset that none of these challenges are, strictly speaking, entirely jurisdictional in nature. The Pre-Trial Judge shall nevertheless address these challenges only if and to the extent that they affect the application of JCE before the SC.

204. As regards the Defence argument in relation to the *in dubio pro reo* principle, the Pre-Trial Judge considers that, assuming that this principle is applicable at this juncture, in view of the above findings that Article 16(1)(a) of the Law encompasses the customary international law definition of "commission" and that JCE was part of

[432] Basic Court of Mitrovicë, Judgment, 8 August 2016, P184/15, paras 86-88; Court of Appeals of Kosovo, Judgment, 15 September 2016, PAKR 455/2015, p. 45; both referred to in Selimi JCE Reply, paras 34-35.

customary international law at the time the alleged crimes were committed, no reasonable doubt remains warranting the application of this principle.[433] The Pre-Trial Judge accordingly finds the Defence argument without merit.

205. As regards the Defence argument in relation to the *lex mitior* principle, the Pre-Trial Judge refers to the above findings elaborating on the application of this principle.[434] Furthermore, having found that JCE III was and remains part of customary international law,[435] the Pre-Trial Judge considers that no change has occurred in the applicable law warranting an assessment under this principle. The Pre-Trial Judge accordingly finds the Defence argument without merit.

206. As regards the Defence argument in relation to the principle of culpability, the Pre-Trial Judge notes that JCE III is predicated on several conditions.[436] First, the person must intentionally participate in and contribute to the common purpose. Such participation must amount to a significant contribution by that person to the furtherance of the common purpose. Second, it must have been foreseeable to this person that the deviatory crime might be perpetrated in carrying out the common purpose. Third, he or she must have willingly taken the risk that the deviatory crime might occur when participating in the common purpose. Mere membership in a JCE cannot lead to liability under any of the three JCE forms, so neither can be applied as guilt by association.[437] It is the personal participation or contribution of the person, coupled with the other conditions and as demonstrated by relevant evidence, that leads to this liability. The Pre-Trial Judge accordingly finds the Defence argument without merit.

207. As regards the Defence argument in relation to the application of JCE III to special intent crimes, the Pre-Trial Judge notes, at the outset, that the jurisprudence is

[433] Ojdanić Appeals Chamber Decision, para. 28.
[434] *See* paras 105-106 above.
[435] *See* paras 186, 190 above.
[436] Confirmation Decision, paras 106-110, 114-115.
[437] *Similarly* STL, 2011 Appeals Chamber Decision, para. 245.

divided. The ICTY has typically allowed for convictions under JCE III for special intent crimes, such as genocide and persecution.[438] The Appeals Chamber of the STL and the Trial Chamber in the *Charles Taylor* case of the SCSL took a different approach and barred convictions under JCE III for special intent crimes such as terrorism.[439] Subsequent ICTY case-law declined to depart from its own precedent.[440]

208. The Pre-Trial Judge notes that when specific intent is required for the realisation of certain crimes, the perpetrator must satisfy not only the subjective elements of the crimes associated, as the case may be, with one or other of the material elements, but also an additional mental element (*dolus specialis*),[441] which requires that the accused intended to reach the specific purpose in question.[442] Conversely, to be held liable under JCE III, an accused need not share the intent of the person committing the deviatory crime; he or she must only foresee that the deviatory crime might be perpetrated in carrying out the common purpose and must willingly take the risk that the crime might occur.[443] Accordingly, for the purposes of the present case, the Pre-Trial Judge considers that it would be a legal anomaly to convict any of the Accused as participants in a JCE (e.g., involving arbitrary detention and cruel treatment) for having merely foreseen the possibility that the crimes within the common purpose would eventually lead to the *dolus specialis* crimes of persecution or torture being committed.[444] The Pre-Trial Judge accordingly finds merit in the Defence argument

[438] *See* ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, *Decision on Interlocutory Appeal*, 19 March 2004, paras 5-10; Stakić Appeal Judgment, para. 38.
[439] *See* STL, 2011 Appeals Chamber Decision, paras 248-249; SCSL, Taylor Trial Judgment, para. 468.
[440] *See* ICTY, Đorđević Appeal Judgment, para. 81; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Appeals Chamber, Judgement, 30 June 2016, para. 597; Karadžić Appeal Judgment, paras 422-437.
[441] ICC, Katanga Trial Judgment, para. 772.
[442] *Similarly* STL, 2011 Appeals Chamber Decision, para 248.
[443] Confirmation Decision, para. 114.
[444] STL, 2011 Appeals Chamber Decision, para 248: the STL Appeals Chamber held that the combination of a specific intent crime with JCE III leads to "a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*".

and orders the SPO to amend the Indictment excluding JCE III liability for the special intent crimes.[445]

209. In light of the foregoing, the Pre-Trial Judge rejects the Defence arguments regarding the principles of *in dubio pro reo, lex mitior* and culpability. Furthermore, the Pre-Trial Judge finds merit in the Defence argument regarding the application of JCE III to special intent crimes and orders the SPO to amend the Indictment as provided in paragraph 208.

2. Responsibility of the Superior

210. The Defence contends that (i) the SC does not have jurisdiction over superior responsibility because Kosovo law applicable at the time of the alleged crimes did not recognise this as a mode of liability; and (ii) even if customary international law were found to be applicable, the Pre-Trial Judge ought to consider whether international law or domestic law produces a result substantially more favourable to the Accused and to apply a more lenient regime. The Defence further submits that, as a result of recent legal developments and case-law, the notion of superior responsibility has evolved towards a concept which is more in line with the principle of legality.[446]

211. As regards the Defence argument that SC does not have jurisdiction over superior responsibility because relevant Kosovo law did not recognise this mode of liability, the Pre-Trial Judge notes that Article 16(1)(c) of the Law sets out the elements of superior responsibility to be applied for crimes under Articles 13-14 of the Law. Having found earlier that Article 16(1) of the Law must be interpreted in accordance with customary international law applicable at the time the alleged crimes were committed and that provisions of Kosovo criminal law regulating modes of liability

[445] Confirmation Decision, paras 69, 82, 102.
[446] Veseli Jurisdiction Motion, paras 125-130.

are not applicable in relation to that provision,[447] the Pre-Trial Judge sees no merit in further addressing the Defence argument.

212. As regards the Defence argument that the Pre-Trial Judge ought to consider whether international or domestic law produces a result substantially more favourable to the Accused, the Pre-Trial Judge refers to the above findings elaborating on the application of the *lex mitior* principle.[448] Furthermore, the Pre-Trial Judge notes that the concept of superior responsibility has been known and applied since at least World War II,[449] was codified in Additional Protocol I to the Geneva Conventions,[450] has been widely applied by the ICTY and ICTR and its customary nature is virtually unchallenged.[451] In light of Article 3(3) of the Law, the Pre-Trial Judge may take in consideration this consistent jurisprudence and address the above questions only to the extent of ascertaining whether the Defence has presented persuasive reasons warranting different legal findings on the matter at hand. In this regard, the Pre-Trial Judge observes that the Defence's reference to the ICC Statute and case-law as strong indicators of a possible divergence in the customary international law concept of superior responsibility are inapposite as neither are determinative of customary international law.[452] In the absence of any further arguments presented by the Defence

[447] *See* paras 177-178 above.
[448] *See* paras 105-106 above.
[449] *See* *In Re Yamashita*, US Supreme Court, 4 February 1946, 327 U.S. 1; *US v. Pohl et al.*, 3 November 1947, in CCL10 Military Tribunals, Volume V; *US v. Karl Brandt et al.*, in CCL10 Military Tribunals, Volume II, 1950; Hostages; *US v. von Leeb et al.*, in CCL10 Military Tribunals, Volume XI, 1950; *US v. Araki et al.*, International Military Tribunal for the Far East, Judgment, 4 November 1948, in J. Pritchard and S. M. Zaide (eds.), The Tokyo War Crimes Trial, 1981, Vol. 22.
[450] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 17512, 8 June 1977, Articles 86-87.
[451] ICTY, Aleksovski Trial Judgment, para.70; *Prosecutor v. Blaškić*, IT-95-14-T, Trial Chamber, Judgement, 3 March 2000, para.290; Delalić et al. Appeal Judgment, para.195; *Prosecutor v. Hadžihasanović*, IT-01-47-PT, Trial Chamber, *Decision on Joint Challenge to Jurisdiction*, 12 November 2002, paras 93(v), 167; ICTR, *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Trial Chamber II, Judgement, 21 May 1999, paras 220, 492; *Prosecutor v. Musema,* ICTR-96-13-T, Trial Chamber I, Judgement and Sentence, 27 January 2000, paras 128-148. *See also* SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-T, Trial Chamber II, Judgement, 20 June 2007, para. 782.
[452] *See* para. 187 above.

indicating a possible change in the applicable law warranting an assessment under the *lex mitior* principle, the Pre-Trial Judge finds no merit in further addressing this argument.

213. In light of the foregoing, the Pre-Trial Judge rejects the Defence arguments regarding superior responsibility.

V. DISPOSITION

214. For the above-mentioned reasons, the Pre-Trial Judge hereby:

(a) **REJECTS** the Selimi Jurisdiction Motion (JCE);

(b) **REJECTS** the Thaçi Jurisdiction Motion insofar as it challenges the jurisdiction of the SC in relation to JCE and the charges against Mr Thaçi on the basis that these charges exceed the Council of Europe Report;

(c) **REJECTS** the Krasniqi Jurisdiction Motion;

(d) **GRANTS** in part the Veseli Jurisdiction Motion and **ORDERS** the SPO to file an amended indictment excluding JCE III liability for the special intent crimes; and

(e) **REJECTS** the remainder of the Veseli Jurisdiction Motion.

Judge Nicolas Guillou

Pre-Trial Judge

Dated this Thursday, 22 July 2021

At The Hague, the Netherlands.